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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and CONAIR CORPORATION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1623

CONAIR CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, INTERVENOR

Petition for Review of an Order of the National Labor Relations Board

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Argued July 6, 1983

Decided November 15, 1983

Herbert Burstein for petitioner. *Randy Lewis Levine* and *David A. Kapelman* also entered appearances for petitioner.

Marjorie S. Gofreed, Attorney, National Labor Relations Board, with whom *Elliott Moore*, Deputy Associate General Counsel, National Labor Relations Board, was on the brief, for respondent. *Paul Spielberg*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Max Zimny, with whom *Jesse H. Strauss*, *Sidney Reitman*, *Bennet D. Zurofsky*, *Laurence Gold*, and *David M. Silberman*, were on the brief, for intervenor.

Carl L. Taylor and *Stephen A. Bokat* were on the brief for the Chamber of Commerce of the United States, *amicus curiae* urging that the order be set aside.

Gerard C. Smetana was on the brief for the Council on Labor Law Equality, *amicus curiae* urging that the order be set aside.

Michael E. Avakian was on the brief for Center on National Labor Policy, *amicus curiae* urging that the order be set aside.

Before: WALD, GINSBURG, and SCALIA, *Circuit Judges*.

Opinion for the Court in parts I-V.B filed by *Circuit Judge* GINSBURG.

Opinion for the Court in part V.C filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Circuit Judge* WALD.

Dissenting opinion filed by *Circuit Judge* GINSBURG.

Separate concurring statement filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: This case presents a controversial question in federal labor relations law. Centrally at issue is the scope of authority Congress accorded the National Labor Relations Board (NLRB or Board) under the National Labor Relations Act (NLRA or Act) to issue a bargaining order when an employer has committed " 'outrageous' and 'pervasive' unfair labor practices . . . of 'such a nature that their coercive effects cannot be eliminated by the application of traditional

remedies, with the result that a fair and reliable [representation] election cannot be had.' "[1] The Supreme Court so described a category of cases in *NLRB v. Gissel Packing Co.*, and thereby opened the question whether a bargaining order might issue to redress the employer's grave misconduct even though the union involved never received authorization cards from a majority of the bargaining unit employees and lost a representation election.[2] We confront here the situation the Supreme Court described but did not decide in *Gissel*: the employer engaged in "outrageous" and "pervasive" unfair labor practices; the union never achieved a card majority, it did not otherwise demonstrate majority support, and it lost the representation election; the NLRB, in a three to two decision, issued a bargaining order.

On December 7, 1977, Local 222 of the International Ladies' Garment Workers' Union (Union) lost a representation election among the production and maintenance employees of Conair Corporation (Conair or Company). Joint Appendix (J.A.) 583a-84a. In administrative proceedings brought by the Board's General Counsel to set aside the results of the election and to remedy the Company's unfair labor practices, an Administrative Law Judge (ALJ) found that Conair had engaged in "outrageous" and "pervasive" unfair labor practices. *Conair Corp.*, 261 NLRB 1189, 1285 (1982). The ALJ's proposed order directed Conair to implement extraordinary notice and access remedies, including a requirement that Conair's president personally read the NLRB's remedial notice to an assemblage of the company's employees. The ALJ declined to recommend a bargaining order, however, because the union never obtained authorization cards from a majority of the bargaining unit employees. *Id.* at 1284-85 & n.451 (noting that the NLRB had not yet issued a bargaining order absent a card majority).

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[1] NLRB v. Gissel Packing Co., 395 U.S. 575, 613-14 (1969).

[2] *See id.*

The Board affirmed the ALJ's findings of fact, amending them only to include a finding that Conair had actually discharged its striking employees on April 22, 1977. *Id.* at 1189-90. Adopting the notice and access remedies proposed by the ALJ, the Board further ruled that Conair's "massive and unrelenting coercive conduct" warranted imposition of a bargaining order. *Id.* at 1192-94.[3] Conair has challenged the NLRB's decision.

We conclude that Conair did not receive fair notice of, and opportunity to respond to, a claim that it actually discharged striking employees on April 22, 1977; we therefore decline to enforce the Board's order in that particular. On the central issue, we hold that Congress has not empowered the Board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation; we therefore decline to enforce the NLRB's bargaining order. In all other respects, we deny Conair's petition for review and grant the Board's cross-petition for enforcement of its order.

On two issues, the panel is divided: (1) the NLRB's authority to issue a nonmajority bargaining order; and (2) the requirement that Conair's president personally read the NLRB's remedial notice to an assemblage of employees. Judge Wald, for the reasons stated in her dissenting opinion, would enforce the Board's bargaining order. For the reasons stated in Part V.C of this opinion, written by Judge Wald, the court upholds the Board on the presidential reading issue. Judge Ginsburg dissents on this issue; she would allow Conair's president, if he so elects, to designate a responsible officer to read the remedial notice on his behalf.

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[3] Subsequent to the ALJ's decision, the Third Circuit held in United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980), that the NLRB had the authority to issue a nonmajority bargaining order to remedy "outrageous" and "pervasive" employer unfair labor practices. The Board issued such an order on remand in that case. *See* United Dairy Farmers Coop. Ass'n, 257 NLRB 772 (1981).

I. BACKGROUND

Conair is engaged in the manufacture, sale, and distribution of hair care, personal grooming, and related products. At all times relevant to this controversy, Conair maintained its administrative offices, conducted warehousing and distributional operations, and produced electrical hair care appliances at the Company's facility in Edison, New Jersey. 261 NLRB at 1203-04.[4] When the events at issue occurred, the Edison plant employed 300 unit workers. *Id.* at 1285 n.451.[5] Most of these employees, it appears, were Spanish speaking. *Id.* at 1208 n.31, 1268 n.369.

In March of 1977,[6] the Union began an organizational campaign at Conair's Edison plant. *Id.* at 1205. In early April, shortly after becoming aware of the Union's campaign, the Company conducted a series of unprecedented management-employee meetings in direct response to the Union's efforts. *Id.* at 1262, 1265. Conair Vice-Presidents John Mayorek and Jerry Kampel held a meeting for all unit employees in the plant's cafeteria on April 4. *Id.* at

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[4] As set out *infra* pp. 20-22, we reject Conair's challenge to the credibility determinations and findings of fact made by the ALJ, and affirmed by the Board. We therefore summarize the ALJ's factfindings in this background statement. Citations to 261 NLRB in Part I refer to the ALJ's opinion, rather than the Board's opinion, unless otherwise indicated by the context.

[5] As described by the ALJ, the bargaining unit included:

> All production and maintenance employees including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees . . . at [the] Edison plant, but excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the [National Labor Relations] Act.

261 NLRB at 1259-60.

[6] All events described herein occurred during 1977, unless otherwise noted.

1205. At that meeting, Mayorek indicated that the Company knew of the organizational campaign. He then pointed out the benefits provided by the Company in the past, *id.* at 1205-08, cautioned that certain current benefits would be lost with unionization, *id.* at 1205-08, 1267,[7] and promised that in the future the Company would provide a variety of benefits—many directly responsive to employee complaints aired at the meeting. *Id.* at 1205-08, 1264 & n.351, 1272.[8] Mayorek further informed the employees that the Company had an "open-door" policy—previously unknown to most, if not all, employees—whereby they could bring grievances directly to managerial personnel.[9] This direct access to management also would be lost with unionization, he warned. *Id.* at 1205-08, 1262-63. Kampel reiterated much of what Mayorek said. *Id.* at 1208, 1267, 1272.[10]

On April 6, Conair President Leandro Rizzuto addressed a second mass meeting of unit employees held in the production area. His remarks tracked the earlier remarks of Mayorek and Kampel. President Rizzuto stated that

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[7] Mayorek stated that only nonunion employees could participate in Conair's profit sharing plan, and that the Union would provide a health insurance plan inferior to the plan Conair offered. 261 NLRB at 1268.

[8] Mayorek promised an improved wage and benefits package, the hiring of a bilingual personnel director to deal with worker complaints, installation of a new water fountain, and expansion of the cafeteria to provide hot and cold meals. *Id.* at 1272. All but the last of these promised benefits answered complaints employees expressed at the meeting. *Id.* at 1264 & n.351.

[9] The ALJ doubted that Conair had an "open-door" policy prior to the April 4 meeting. *Id.* at 1262-63.

[10] An interpreter translated Mayorek's and Kampel's remarks into Spanish. Conair similarly provided Spanish translations of the remarks made at the April 6 mass meeting described below. *Id.* at 1206, 1210.

he could not understand why the employees would want to unionize; he then recited current benefits, cautioned that unionization would result in the loss of certain benefits,[11] and promised various additional benefits in the future. *Id.* at 1210-12, 1267-68, 1273.[12] Rizzuto warned that if he had to pay the increased wages the Union would demand, he would go out of business. *Id.* at 1210-12, 1267-68. He also stressed that, without a union, employees were free to bring complaints directly to supervisory and managerial personnel; with a union, he said, someone would have to represent workers before management, resulting in delay. *Id.* at 1211-12, 1267-68.

Later that same day, Rizzuto, Mayorek and Kampel held several meetings with groups of ten to fifteen employees during which they again spoke of current and future benefits, and of the "open-door" policy. Rizzuto stated at the small group sessions that if a union came in, it would be cheaper to move to Hong Kong than to remain in Edison. *Id.* at 1214-15, 1268, 1273.[13] Kampel promised to deal with several employee complaints aired at these meetings. *Id.* at 1214-15, 1273.[14]

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[11] These included the profit sharing plan and Christmas parties and gifts. *Id.* at 1267-68.

[12] In addition to the benefits promised on April 4, *see supra* note 8, Rizzuto promised that the security guard's negative attitude toward the employees, of which they had complained, would change. *Id.* at 1273.

[13] At the time Rizzuto spoke of moving, Conair already participated as a joint venturer in a Honk Kong production facility for electrical hair care appliances. *Id.* at 1204.

[14] Kampel promised to provide gloves to protect assembly-line workers' hands and to investigate the allegedly unfair discharge of a worker. *Id.* at 1216, 1273.

In contacts with small groups or individual employees, various supervisory personnel reiterated points Conair officials had made at the early April meetings. *See id.* at 1267 (closing

In response to Conair's extraordinary management-employee meetings, the Union called an unfair labor practice strike on the morning of April 11. *Id.* at 1217, 1277.[15] Approximately 125-140 unit employees participated in the strike that morning,[16] and over 100 remained at the plant to picket. *Id.* at 1218, 1277. The strike continued for over five months, ending on September 23. Disorganized picketing and numerous spontaneous acts of picket line violence[17] marked the first two days. *Id.* at 1219-26, 1287.[18] Thereafter, apart from a few incidents during

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of plant and moving to Hong Kong if Union comes in); *id.* at 1273 (promise of new wage package). Supervisory personnel also interrogated two employees about their union activities during this period. *Id.* at 1275.

[15] On April 6, 25-30 unit employees went to the Union hall to report on the various meetings. Some of these employees asked for return of their authorization cards, stating that they did not want to lose their jobs. The Union assured them that Conair's actions had been illegal and the next day told a meeting of 50-60 unit employees that they could strike to protest the Company's actions. Upon receiving an enthusiastic response from the assembled employees, and thereafter further exploring its options, the Union resolved to call the strike. *Id.* at 1217, 1277.

[16] Approximately 100 unit employees remained away from work and participated in picketing during the entire strike. *Id.* at 1217 n.73.

[17] These included rock and bottle throwing, tire slashing, name calling, threats against nonstriking workers, minor injuries to nonstrikers, damage to the nonstrikers' automobiles, and damage to plant property. *Id.* at 1287.

[18] On April 13, Conair secured a state court injunction (consented to by the Union, J.A. 306a) limiting the Union to a total of 10 pickets and forbidding the pickets from interfering with employees or vehicles seeking entry into or exit from the plant. J.A. 273a-75a. This injunction was vacated on May 16. J.A. 591a-92a. Conair obtained a second, similar injunction on July 21 that remained in effect until the end of the strike. J.A. 301a-03a, 319a-21a.

the week of July 18,[19] no significant picket line misconduct occurred. *Id.* at 1287.[20]

On April 13, the Union initiated two administrative actions: it petitioned the Board for certification as unit representative, J.A. 579a-80a;[21] and it filed an unfair labor practice charge against Conair based on the early April meetings. J.A. 271a-72a. The Union and the Company then entered into a stipulation to hold a consent election among all unit employees on Conair's payroll as of April 9. J.A. 581a-83a.[22] This election, originally scheduled for May 6, was postponed on May 5 pending

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[19] The primary incident occurred during the evening of July 21 when a Roadway Express driver arrived at the Conair plant in his personal vehicle and without any evident business purpose. A Union official struck the driver with a tire jack during an argument apparently over the picketers' previous treatment of another Roadway Express driver. 261 NLRB at 1232-36 & n.172.

During the course of the strike a series of fires occurred at the Edison plant and one night the windows of the executive offices were blown out by a shot-gun. No evidence established the Union's complicity in these acts, however. *Id.* at 1227 & n.133, 1287 & n.464.

[20] The ALJ based this finding in part on the extensive videotapes Conair made of the picketers from approximately April 13 or 14 until the end of the strike. *Id.* at 1276, 1287 n.465.

[21] As of April 13, at least 124 workers had signed cards authorizing the Union to "act exclusively as [their] agent and representative for the purpose of collective bargaining." *Id.* at 1205; J.A. 413a. The Union eventually obtained another 14 authorization cards. 261 NLRB at 1205.

[22] *See* NLRB Statements of Procedure, 29 C.F.R. § 101.19(b) (1983). The stipulation provided that Local 102, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), which had intervened, would also be listed on the ballot. 261 NLRB at 1205; J.A. 581a-82a; *see* NLRB Casehandling Manual (Part II: Representation Proceedings) § 11022.3(d) (1975).

resolution of an unfair labor practice charge (based on the early picket line violence) the Company had filed with the Board on April 25. 261 NLRB at 1202 n.1; J.A. 280a-81a.[23]

During the course of the strike, the Company repeatedly made it clear to the striking employees that persistence in the concerted action would result in loss of their jobs. On April 20, Conair sent mailgrams to the strikers stating that they would be deemed to have quit their jobs unless they reported to work on April 22. 261 NLRB at 1237-38, 1268; J.A. 453a.[24] Conair subsequently sent each striker a letter dated June 9 which, in the Spanish version,[25] offered "full and immediate reinstatement . . . if you accept unconditionally our offer to return to work."

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[23] When an unfair labor practice charge that might affect the outcome of an election is filed shortly before the election and the NLRB finds that the charge has prima facie merit, the usual course is to postpone the election pending resolution of the charge or waiver by the charging party of its right to challenge the election on the basis of the charged conduct. *See* Suprenant Mfg. Co. v. Alpert, 318 F.2d 396, 397 (1st Cir. 1963).

[24] The mailgrams stated in full in both Spanish and English:

> WE HAVE CALLED YOU REPEATEDLY TO YOUR JOB. DESPITE YOUR PROMISES TO DO SO, YOU HAVE FAILED TO REPORT FOR DUTY. THERE IS NO VIOLENCE, EMPLOYEES FREELY ENTER THE PLANT. UNLESS YOU REPORT TO WORK ON FRIDAY APRIL 22 1977 AT YOUR REGULAR STARTING TIME YOU WILL BE DEEMED TO HAVE VOLUNTARILY QUIT YOUR JOB.

261 NLRB at 1237-38; J.A. 453a. The Union filed an unfair labor practice charge against Conair on May 19 alleging that the mailgrams threatened a discriminatory discharge and that the employees were so discharged as of April 22. J.A. 285a.

[25] The ALJ concluded that 75-80% of Conair's employees were Spanish speaking and noted that 79% of the 1977 strikers have Spanish surnames. 261 NLRB at 1268 n.369.

261 NLRB at 1238-39 & n.216, 1268; J.A. 452a.[26] Finally, Conair sent letters to the strikers in July or August stating in English and Spanish that the Company had notified the insurance carriers for the employees' medical and life insurance plans that the strikers no longer worked for Conair. 261 NLRB at 1239, 1268 & n.371; J.A. 484a.[27]

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[26] The letter stated in full in the Spanish version:

> OUR TELEGRAM OF APRIL 20, 1977, IS HEREBY RESCINDED. YOU ARE HEREBY OFFERED FULL AND IMMEDIATE REINSTATEMENT TO YOUR FORMER JOB OR, IF YOUR JOB NO LONGER EXISTS, TO A SUBSTANTIALLY EQUIVALENT POSITION, *IF YOU ACCEPT UNCONDITIONALLY OUR OFFER TO RETURN TO WORK.*

261 NLRB at 1238-39 & n.216; J.A. 452a (emphasis added). The English version replaced the italicized portion with "upon your unconditional offer to return to work." An employer has an obligation to reinstate unfair labor practice strikers who express their willingness to return to work. *See, e.g.*, Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956); Teamsters Local 115 v. NLRB, 640 F.2d 392, 394 (D.C. Cir.), *cert. denied*, 454 U.S. 837 (1981); Jimmy Dean Meat Co., 227 NLRB 1012, 1032 (1977).

[27] The letters stated in full in both Spanish and English:

> Dear Employee:
>
> You have been requested on two occasions within the last three months, to report to work and you have failed to do so. Under our medical and life insurance policies, "Cessation of active service in a class of employees eligible for insurance shall be deemed termination of employment." Consequently, we have advised the insurance companies that you are not working for Conair.
>
> You must also recognize that all accrued vacation benefits have been suspended and all forms will be mailed to you within 30 days.

261 NLRB at 1239; J.A. 484a. One insurance company sent the strikers letters notifying them that they were no longer

Meanwhile, inside the plant, the Company persisted in its efforts to eliminate unrest among its nonstriking employees.[28] Conair officials, both at meetings and in remarks to individual employees, continued to encourage workers to voice to management any grievances they might have. 261 NLRB at 1226, 1257 & n.371, 1262, 1265; J.A. 2328a. A bilingual personnel director, promised by Mayorek on April 4, commenced employment at the Edison plant on June 1. 261 NLRB at 1238. Thereafter, the Company planned and implemented a variety of benefits[29]—many in response to employee complaints raised during the early April meetings. *Id.* at 1246-48, 1274 & n.392.[30]

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covered because Conair had terminated their employment on the ground that they had "left [their] job[s]." 261 NLRB at 1239, 1268 & n.371.

[28] Throughout the strike Conair posted three large signs outside its plant stating in effect that Conair employees were not on strike. 261 NLRB at 1226, 1269. The ALJ concluded, in light of Conair's other actions, that these signs conveyed to the strikers the message that they were no longer considered by the Company as employees. *Id.* at 1269.

[29] On April 7, prior to the strike, Conair for the first time gave Easter gifts to its employees. *Id.* at 1216, 1274.

[30] Sometime between June 1 and the end of the strike the Company established a system for promoting current employees by bidding for jobs, *id.* at 1247; set up salary standards and performance ratings, *id.* at 1247-48; began a newsletter, *id.* at 1248; and allocated parking spaces by seniority, *id.* In addition, sometime between June 1 and the representation election, the Company expanded the cafeteria to provide hot food, *id.* at 1246-47; instituted formal termination and layoff procedures, *id.* at 1247; established an employee credit union, *id.* at 1248; organized employee social clubs, *id.*; improved safety procedures, *id.*; hired a bilingual nurse, *id.*; gave employees a holiday on their birthdays, *id.*; provided an extra drinking fountain in the production area, *id.* at 1274; and supplied gloves to the women on the assembly line, *id.*

Despite promises, Conair presented no new wage package during the strike or prior to the election. On numerous occa-

After a spring and summer of concerted action, the Union informed Conair that the strike would end on September 23; on behalf of all striking employees, the Union made an unconditional offer to return to work on that day. *Id.* at 1240, 1277. The Company accepted the offer but refused to reinstate the strikers immediately.[31] Instead, when the strikers reported to the plant on September 28, the Company required them to fill out job applications. *Id.* at 1240-41, 1278. During the period from October 4 to November 7, most of the strikers received reinstatement offers[32] and returned to work. *Id.* at 1241, 1279.[33] Conair initially offered five strikers jobs less desirable than the ones they held before the strike, however, and never offered reinstatement to thirteen strikers.[34]

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sions during the strike, Conair officials explained to the nonstriking employees that it would be illegal to offer such a package before Conair's labor problems were solved. *Id.* at 1226 & n.126, 1273.

[31] The Union responded to this refusal by filing another unfair labor practice charge. J.A. 341a-42a.

[32] Conair made the offers by means of a mailgram written in English only and mailed a scant one to four days prior to the date on which the employee had to report for work in order to accept. 261 NLRB at 1241, 1278.

[33] Upon returning to work, the strikers had to fill out new tax and insurance forms. The Company wrote "new hire" on many of the returning strikers' time cards and replaced the original date of hire on several strikers' attendance records with the return date. *Id.* at 1241-42, 1279.

[34] The Company refused to offer reinstatement to four employees who were arrested on the picket line and pled guilty to obstructing passage of a motor vehicle, *id.* at 1242-43, 1279-80, one employee who was arrested outside the plant and pled guilty to loitering, *id.* at 1242-43, 1281, and five employees who had responded to the June 9 letter but later rejoined the strike, *id.* at 1243-44, 1281. Conair mailed offers of reinstatement to two strikers at incorrect addresses, and failed to send an offer

On November 23, the Board approved a formal settlement of the unfair labor practice charges Conair had filed alleging picket line misconduct by the Union. J.A. 362a-66a.[35] The representation election initially scheduled for May 6 was thereafter rescheduled for December 7. 261 NLRB at 1202 n.1. During the two weeks prior to the vote, supervisory personnel repeatedly stated to various unit employees that Conair's president would close the Edison plant and move to Hong Kong if the Union won the election. *Id.* at 1248-51, 1269.[36] Supervisors also warned on several occasions that, in the event of a Union

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to one striker. When these errors were brought to Conair's attention, the Company refused to correct them. *Id.* Further, Conair discharged three reinstated strikers who had taken authorized leave. *Id.* at 1244-46, 1281-82. The Union filed unfair labor practice charges protesting these discharges. J.A. 367a-69a.

[35] This settlement required the Union to cease and desist from any further picket line misconduct and to post a notice of the settlement for 60 days. J.A. 364a.

Conair's original April 25 charge against the Union had been informally settled on May 12. J.A. 282a. The Board's Regional Director withdrew his prior approval of the settlement and issued a complaint on August 25, after the Company filed a second unfair labor practice charge alleging further Union violence. J.A. 322a-31a. The Union and the General Counsel reached a formal settlement on September 1, J.A. 332a-40a, but Conair objected because, inter alia, the Union did not admit guilt in the stipulation. J.A. 362a n.1.

[36] Supervisors had made similar statements to unit employees in October. 261 NLRB at 1248-49. Moreover, at a mass meeting for unit employees held on October 26, President Rizzuto warned that no company can give what the Union promised and still remain in business. *Id.* at 1271. Rizzuto also stated during the October 26 meeting that the Company could not spell out its future plans for improved benefits because the Union would object to the Board. *Id.* at 1273. Once again, he pointed to the Company's "open-door" policy. *Id.* at 1265.

victory, the employees would not receive their Christmas bonuses. *Id.* at 1250, 1253-54, 1270. "Raffle tickets" inundated the plant warning that a vote for the Union was a vote for plant closure. *Id.* at 1251-53, 1269-70.[37] Finally, Conair distributed campaign literature (printed in both Spanish and English, *id.* at 1254) and "Statements of Account" declaring that the Company's profit sharing plan was for nonunion employees only. *Id.* at 1254, 1270.

The Union lost the December 7 election by a vote of 136 to 69;[38] eight votes were cast for the Teamsters[39] and forty-one ballots were challenged. J.A. 583a-84a. On March 8, 1978, the Board's Regional Director filed a complaint in which he consolidated the Union's challenge to the election with allegations drawn from the various unfair labor practice charges the Union had filed against Conair. 261 NLRB at 1202 & n.2; J.A. 370a-93a.[40]

Hearings on the Regional Director's complaint ran for thirty-eight days, commencing on March 23, 1978, and ending on June 2, 1978. 261 NLRB at 1202 & n.4. On July 30, 1980, the ALJ issued his decision and recommended order. J.A. 260a. The ALJ determined that

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[37] These tickets stated in relevant part:

> WIN AN EXCITING ALL EXPENSE PAID TRIP TO CONAIR'S NEW FACILITIES IN BEAUTIFUL HONG KONG. DONATION: ONE UNION VOTE

Id. at 1251. There is evidence linking the Company to the distribution of these "raffle tickets." *Id.* at 1251, 1269-70.

[38] The electorate consisted of the 300 unit employees on Conair's payroll as of April 9. *Id.* at 1259-61, 1285 n.451.

[39] The Teamsters withdrew from the proceedings on December 19, 1977. J.A. 583a n.2.

[40] This complaint amended several prior complaints. *See* J.A. 286a-93a, 345a-61a, 370a-93a; *infra* pp. 25-27.

Conair had violated section 8(a)(1) of the NLRA [41] by soliciting employee grievances during an organizational campaign through means more elaborate than previously used and with the promise (expressed or implied) that reported grievances would be adjusted, 261 NLRB at 1266-67; by threatening its employees with loss of current benefits if they supported a union, *id.* at 1270-71; by threatening its employees with plant closure if they supported a union, *id.* at 1269-70; by threatening to discharge its employees for engaging in protected concerted action, *id.* at 1268-69; by promising (expressly or impliedly) and granting benefits to induce its employees to renounce unionization, *id.* at 1273-75; by coercively interrogating several employees concerning their union activities, *id.* at 1275-76; and by creating the impression that its employees' union activities were under surveillance, *id.* at 1276. *See id.* at 1288. The ALJ further determined that Conair's disadvantageous treatment of unfair labor practice strikers, based on their union activities, was unlawful under both section 8(a)(1) and section 8(a)(3) of the NLRA.[42] In this category of violations, the ALJ included the Company's failure to reinstate the strikers immediately upon their unconditional offer to return to work, *id.* at 1279; its failure initially to reinstate five strikers to positions substantially equivalent to their pre-strike jobs, *id.* at 1279; its failure ever to reinstate thirteen strikers, *id.* at 1281; and its discharge of three previously reinstated strikers, *id* at 1282. *See id.* at 1288. Conair's 8(a)(1) and 8(a)(3) violations, the ALJ concluded, were sufficiently grave and

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[41] Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights the NLRA accords them.

[42] Section 8(a)(3), 29 U.S.C. § 158(a)(3) (1976), bars encouraging or discouraging membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment."

numerous to place the Company's conduct within the "outrageous" and "pervasive" category described by the Supreme Court in *Gissel*. *Id.* at 1285.

The ALJ's recommended order directed Conair to cease and desist from the enumerated unfair labor practices and from violating section 8(a)(1) in any other manner,[43] and to implement extraordinary notice and access remedies. *Id.* at 1283, 1285.[44] The ALJ declined to recommend a bargaining order, however, because the Union never had obtained authorization cards from a

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[43] The ALJ's proposed order called upon the Company to reinstate with back pay all strikers refused reinstatement or initially recalled and later discharged. His order also awarded back pay to all strikers whose reinstatement was delayed. 261 NLRB at 1283; J.A. 263a-64a.

[44] These remedies required Conair to:

(1) Mail a notice of the remedial order (in both Spanish and English) to all current and former employees, place the notice in appropriate company publications, and have President Rizzuto read the notice to all current employees;

(2) publish the notice in local newspapers for four weeks;

(3) for two years grant the Union reasonable access to plant bulletin boards, upon request;

(4) for two years grant the Union reasonable access to nonwork areas of the plant during the employee's nonwork time, upon request;

(5) supply the Union, upon a request made within one year, the names and addresses of current employees;

(6) for two years give the Union notice of any speeches made by the Company to its employees concerning unionization, and equal time and facilities to respond thereto; and

(7) for two years give the Union the right to deliver a 30-minute speech to the employees on working time prior to any Board election in which the Union will participate.

261 NLRB at 1285.

majority of the unit employees [45] and the Board, at the time of the ALJ's decision, had never issued a nonmajority bargaining order. *Id.* at 1284-85 & n.451.

The full Board generally affirmed the ALJ's findings and proposed remedies. *Id.* at 1189-92; *id.* at 1195 & n.28 (Chairman Van de Water); *id.* at 1199 (Member Hunter).[46] By a divided vote, the Board also imposed a bargaining order retroactive to April 4, 1977—the date Conair began its campaign of unfair labor practices. *Id.* at 1192-94.[47] Finally, the Board majority concluded that the April 20 mailgram resulted in the actual discharge of the striking employees on April 22—and thus Conair was liable for back pay to the strikers from that date until the end of the strike. *Id.* at 1189-90 & n.5.

II. Threshold Issues

Conair initially raises two objections and contends that each of them warrants a decision vacating the Board's order in its entirety. The Company argues first, that the timing of the representation election among

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[45] The Union's 138 cards represented 46% of the 300 unit employees. *Id.* at 1285 n.451.

[46] Chairman Van de Water dissented from the Board's affirmation of the requirement that President Rizzuto himself read the remedial notice to the current employees. *Id.* at 1196 n.28.

[47] Three Board members voted to impose a bargaining order. Only two of these members, however, concluded that the order should be retroactive to April 4; one member of the majority voted that it be prospective only. *Id.* at 1194 & n.24. Two members who opposed the bargaining order in this case nonetheless believe that NLRB bargaining orders generally should be retroactive. We therefore accept NLRB counsel's representation to this court that the bargaining order the Board imposed on Conair is retroactive to April 4, 1977. *See* NLRB Response to the Court's Interrogatories and Supplemental Brief at 1-3 (August 5, 1983) (citing cases).

unit employees contravened NLRB policy and regulations; and second, that credibility assessments along with a host of other findings made by the ALJ, and adopted by the Board, lack foundation in the record. Both objections are insubstantial.

A. *Timing of the Representation Election*

On September 1, 1977, the Union and the Board's General Counsel reached a formal settlement of the unfair labor practice charges alleging picket line misconduct by the Union. J.A. 332a-40a. A term of the settlement required the Union to post a remedial notice at its offices for sixty days. J.A. 335a-36a. The Board approved this settlement, over Conair's objections, on November 23, 1977. J.A. 362a-65a. The representation election was then held on December 7, 1977. J.A. 583a.

The election occurred several weeks too soon, Conair maintains, because the Union's misconduct had destroyed "laboratory conditions," and the Board's own regulations indicate that such conditions could not be restored until expiration of the sixty-day posting period. We note first that it is not altogether clear that NLRB policy called for a sixty-day wait in this case. More importantly, the error, if there was one, was harmless.

NLRB regulations do provide that, "except in exceptional circumstances, no *election* should be held until the posting period has expired." [48] But "exceptional cir-

[48] The relevant regulation states that, upon the settlement of unfair labor practice charges blocking an election, the processing of the election petition may proceed. "However, except in exceptional circumstances, no *election* should be held until the posting period has expired" unless the charging party waives its right to challenge the election on the ground that the posting period had not expired. NLRB Casehandling Manual (Part II: Representation Proceedings) § 11730.8 (1975) (emphasis in original). Conair never executed a waiver. Opening Brief of Petitioner and Cross-Respondent at 32.

cumstances" may be present here. Almost all of the Union's misconduct occurred on April 11 and 12, 1977—eight months prior to the December 7, 1977 election date. 261 NLRB at 1219-26, 1287 (ALJ Opinion). The remaining incidents of misconduct occurred during the week of July 18, 1977—four and one-half months prior to the election. *Id.* at 1287. Moreover, the strike ended on September 23, 1977; there had not even been a picket line for two and one-half months prior to the election. *See id.* at 1240, 1277-78. It would not have been unreasonable, under these circumstances, for the NLRB to conclude that any effects of the Union's picket line misconduct had dissipated prior to December 7, 1977.[49]

In any event, Conair's argument fails on a practical ground. We do not comprehend how a Board-held election arguably tainted by Union misconduct harmed Conair when the Union lost that election. Thus, even if the NLRB should have deferred the election date until sixty days after the Union posted the remedial notice, Conair is not positioned to complain. Scheduling the election during the period the *Union* was required to post a cease and desist notice did not reduce the force of the *Company's* unfair labor practices at which the Board's order is directed.

B. *Substantial Evidence Supports the ALJ's Findings*

Conair's attack on the ALJ's findings do not merit extended discussion. The Company insistently urges that we overturn the ALJ's credibility determinations. Our review of the record confirms that we have no cause to do so.

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[49] An agency, of course, should observe its own regulations, *see, e.g.*, Gardner v. FCC, 530 F.2d 1086, 1089 (D.C. Cir. 1976), and the cloudy position of the NLRB on the election-timing issue suggests that the Board's rules on holding elections during posting periods or while charges are outstanding bear clarification.

The ALJ stated that, in general, he credited the testimony of the General Counsel's witnesses over the testimony of the Company's witnesses. *Id.* at 1265.[50] There is nothing inherently arbitrary, we note, in believing one side's witnesses and not the other's. *See Bruce Duncan Co. v. NLRB*, 590 F.2d 1304, 1309 (4th Cir. 1979); *cf. UAW v. NLRB*, 455 F.2d 1357, 1368-69 & n.12 (D.C. Cir. 1971) (resolving all factual conflicts in favor of one party does not establish bias of ALJ).[51] We find no tenable basis for assigning to the ALJ's credibility calls in this case less weight than we generally accord such assessments. *See, e.g., Local Union No. 984, IBEW v. NLRB*, 697 F.2d 113, 117 (6th Cir. 1982); *NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 99, 100-01 (2d Cir. 1982). His appraisals are neither "hopelessly incredible" nor "self-contradictory." We therefore uphold them. *See, e.g., NLRB v. S.E. Nichols, Inc.*, 704 F.2d 921, 923 (6th Cir. 1983) (uphold unless "lack[ing] a rational basis"); *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983) (uphold unless "inherently unreasonable or self-contradictory"); *NLRB v. American Geri-Care, Inc.*, 697

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[50] The ALJ observed that the testimony of the General Counsel's witnesses was "in large measure given in a forthright manner, was more detailed, generally unequivocal and clear, corroborative and consistent in nature with each other, and most importantly apparently consistent with the other evidence present in the record"; the testimony of the Company's witnesses, on the other hand, was "for the most part contradictory, evasive, guarded and quite defensive, at times unclear and equivocal, and in some instances of such an incredible nature as to be unworthy of belief." 261 NLRB at 1255. *See id.* at 1266 & n.358 (additional reasons for not crediting testimony of Vice-President Mayorek).

[51] The charge that the ALJ without exception disbelieved Conair's witnesses is less than fully accurate. For example, in concluding that strikers engaged in misconduct during the first two days of the strike, the ALJ credited testimony of Company witnesses. *Compare id.* at 1218-19 & n.80 *with id.* at 1219-26.

F.2d 56, 60 (2d Cir. 1982) (uphold unless "hopelessly incredible"), *cert. denied*, 103 S. Ct. 1876 (1983); *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 170 (1st Cir. 1982) (uphold unless beyond "the bounds of reason"); *see also Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 386-87 (D.C. Cir. 1972) (NLRB finding based on testimony of two witnesses, although contradicted by testimony of a third witness, affirmed because testimony relied on was not "hopelessly incredible").

Conair also contends that many of the ALJ's findings are not supported by substantial evidence because they ignore contrary evidence given by credited General Counsel witnesses. We have reviewed each of the examples cited by the Company [52] and reject Conair's contention. At most, Conair has an argument that in each case rational triers of fact might have drawn conflicting conclusions from the testimony. Under such circumstances, this court has no authority to upset the conclusions reached by the ALJ and the Board. *See, e.g., NLRB v. Concord Furniture Industries, Inc.*, 675 F.2d 426, 428 (1st Cir. 1982); *Kenworth Trucks, Inc. v. NLRB*, 580 F.2d 55, 59 (3rd Cir. 1978).[53]

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[52] *See* Opening Brief of Petitioner and Cross-Respondent at 47-50, 52-53 (examples a, b, d, e & k).

[53] For similar reasons we reject Conair's assertions that the ALJ mischaracterized credited evidence, *see* Opening Brief of Petitioner and Cross-Respondent at 46-47, 50-55 ("Wahler incident" and examples f, g, j & l), and reached conclusions based on insufficient evidence, *see id.* at 49, 52, 55-56 (examples c, h, m & n). *See* Midwest Regional Joint Bd., Amalgamated Clothing Workers v. NLRB, 564 F.2d 434, 438 (D.C. Cir. 1977) ("Our function is not to overturn the Board's choice between two equally plausible inferences from the facts if the choice is reasonable . . . .").

III. The April 20, 1977 Mailgram: Threatened or Actual Discharge

By a three to two vote, the Board held that one of the ALJ's conclusions of law did not reach far enough. The ALJ had determined that Conair's April 20, 1977, mailgram to striking employees *threatened* discharge in violation of section 8(a)(1) of the NLRA (hereafter, 8(a)(1)).[54] The Board's majority decided that the mailgram violated section 8(a)(3) of the NLRA (hereafter, 8(a)(3)) as well,[55] because it amounted to more than a threat; it in fact terminated the strikers' employment as of April 22, 1977.[56] We hold that Conair was not afforded timely

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[54] As earlier noted, § 8(a)(1), 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights the NLRA accords them.

[55] As earlier noted, § 8(a)(3), 29 U.S.C. § 158(a)(3), bars encouraging or discouraging membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment."

[56] Actual discharge of unfair labor practice strikers not only violates § 8(a)(1) by "interfer[ing] with, restrain[ing], or coerc[ing] employees" in the exercise of their right to engage in protected concerted activity, it also discourages union membership by "discriminati[ng] in regard to hire or tenure of employment" in violation of § 8(a)(3).

The Board's modification of the ALJ's decision dramatically increased Conair's back pay liability. The Union, by letter and mailgram dated September 21, 1977, notified Conair of the strikers' unconditional offer to return to work as of September 23, 1977. 261 NLRB at 1277-78 (ALJ Opinion). A company has a five-day period to reinstate nondischarged unfair labor practice strikers once an unconditional offer to return is made. *See* Drug Package Co., 228 NLRB 108, 113-14 (1977). The ALJ therefore concluded Conair violated § 8(a)(1) and § 8(a)(3) when, five days after the unconditional offer was made (September 26, 1977), the Company had not reinstated anyone. 261 NLRB at 1279 (ALJ Opinion). Eighty-one strikers were reinstated from October 4, 1977 to

notice that the issue presented by the mailgram was actual, not merely threatened, discharge. Accordingly, we reverse the Board's determination that the mailgram episode violated 8(a)(3).

A. *Background*

On April 20, 1977, Conair sent a mailgram to each of its striking employees, stating in both English and Spanish:

> WE HAVE CALLED YOU REPEATEDLY TO RETURN TO YOUR JOB. DESPITE YOUR PROMISES TO DO SO, YOU HAVE FAILED TO REPORT FOR DUTY. THERE IS NO VIOLENCE, EMPLOYEES FREELY ENTER THE PLANT. UNLESS YOU REPORT FOR WORK ON FRIDAY APRIL 22 1977 AT YOUR REGULAR STARTING TIME YOU WILL BE DEEMED TO HAVE VOLUNTARILY QUIT YOUR JOB.

J.A. 453a. No striking employees reported to work in response to this mailgram. *See* 261 NLRB at 1238 (ALJ Opinion). The Union asserted, in an unfair labor practice charge filed against Conair on May 19, 1977,[87] that

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November 7, 1977. The ALJ's proposed order required Conair to make whole those striking employees for wages lost during the period from September 26, 1977, to "the date of a bona fide offer of reinstatement by [Conair], or their actual reinstatement as the case may be." *Id.* at 1283.

Actually discharged unfair labor practice strikers, however, are entitled to back pay from the date of discharge—even absent an unconditional offer on their part to return to work. *See* Abilities and Goodwill, Inc., 241 NLRB 27, 27-28 (1979). The Board's modification of the ALJ's decision therefore moved the date when the back pay obligation commenced from September 26, 1977, to April 22, 1977. Thus the Board's order adds over five months to Conair's back pay obligation to each unfair labor practice striker.

[87] The Union filed six separate unfair labor practice charges against Conair during and shortly after its organizing campaign. The first charge, Case No. 22-CA-7586, was filed on

the mailgram episode violated 8(a)(1) and 8(a)(3). J.A. 285a. Specifically, the Union charged:

> On or about April 20, 1977, and continuing to date, [Conair], by its officers and agents, *threatened its employees with discharge, and on April 22 discharged said employees*, because of their activities on behalf of Local 222, ILGWU, . . . and for their protected concerted activities. The foregoing employees consisted of those employees who have supported and are supporting the strike called by Local 222.

J.A. 285a (emphasis added).

The first official unfair labor practice complaint was lodged against Conair by the Board's Regional Director on May 31, 1977.[58] It covered unfair labor practices

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April 13, 1977. J.A. 271a-72a. On the same day, the Union also filed a petition for certification of representation in Case No. 22-RC-7119. J.A. 579a-80a. The second charge, Case No. 22-CA-7672, involving the mailgram allegation, was filed on May 19, 1977. J.A. 285a. The NLRB Regional Director's initial complaint, filed on May 31, 1977, alleged only those violations contained in the first charge by the Union. *See* J.A. 286a-93a.

The Union filed the third charge in Case No. 22-CA-7939 on September 29, 1977, J.A. 341a-42a; the Acting Regional Director's first amended complaint, filed on November 11, 1977, consolidated the first three Union charges and, for the first time, contained allegations about the mailgram controversy. *See* J.A. 345a-61a. Three additional charges, in Case Nos. 22-CA-8173, 22-CA-8220, and 22-CA-8238, were filed by the Union on January 26, February 21, and February 24, 1978, respectively. J.A. 367a-69a. The Regional Director's second amended complaint, issued March 8, 1978, consolidated the six charges and the representation petition for hearing. J.A. 370a-93a.

[58] The General Counsel is authorized by § 3(d) of the NLRA, 29 U.S.C. § 153(d), to file unfair labor practice complaints. The Regional Director, as agent for the Board in a particular region, 29 C.F.R. § 102.5 (1983), has authority to issue complaints where it appears an unfair labor practice

charged by the Union prior to May 19, 1977, and therefore did not include any reference to the mailgram. A statement concerning the mailgram episode appeared, initially, in the Acting Regional Director's first amended complaint aginst Conair, issued on November 11, 1977. J.A. 345a-61a. That pleading alleged: "On or about April 20, 1977, at its Edison plant, [Conair] did *threaten its employees with loss of employment* if they continued to support the Union or any other labor organization." J.A. 350a (emphasis added).

Notably, the Acting Regional Director's pleading did not incorporate the Union's charge that employees were in fact discharged by reason of the mailgram. Matching its confinement of the allegation to "threaten[ed] . . . loss of employment," the first amended complaint cited only 8(a)(1), not 8(a)(3), in this context. J.A. 360a. As to other unfair labor practices identified in the pleading, however, the complaint asserted that both provisions, 8(a)(1) and 8(a)(3), had been violated. *See* J.A. 353a-58a, 360a.

A second amended complaint issued on March 8, 1978. J.A. 370a-93a. It added new allegations, *see, e.g.*, J.A. 376a, 385a-86a, but repeated verbatim the mailgram charge as set out in the first amended complaint. J.A. 377a. Again, the pleading stated that the mailgram incident violated 8(a)(1); no 8(a)(3) charge was asserted in relation to this incident. J.A. 391a. Further, as the ALJ noted, "at the commencement of the hearing [before the ALJ] and during the course thereof the second amended complaint was amended at various times by counsel for the General Counsel to include additional allegations of violations . . . by [Conair]." 261 NLRB at 1202. None of these further amendments to the second

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charge has merit. *See* 29 C.F.R. §§ 102.15, 102.74 (1983). If the Regional Director declines to file a complaint, the charging party may appeal this decision to the General Counsel. 29 C.F.R. § 102.19 (1983).

amended complaint alleged actual discharge of strikers in violation of 8(a)(3). *See* General Counsel Exhibit 1 (cc)-(hh).

At the hearing before the ALJ, Conair Vice-President Mayorek testified that he knew of no striking employees who returned to work in response to the April 20 mailgram, J.A. 1485a, and that as of April 22, 1977, the striking employees were considered "[t]o have voluntarily quit their jobs." J.A. 1486a. Referring to this testimony and to the content of the April 20 mailgram, the ALJ concluded that the mailgram expressly threatened discharge in violation of 8(a)(1). 261 NLRB at 1268. Nothing in the ALJ's comprehensive decision, issued in July 1980, however, indicates as an issue in controversy the question whether the April 20, 1977, mailgram occasioned actual discharges in violation of 8(a)(1) and 8(a)(3). By contrast, in instances where the complaint alleged conduct in violation of 8(a)(3), and the evidence supported the allegation, the ALJ concluded that 8(a)(3) had been violated. *See, e.g., id.* at 1278 n.417, 1279, 1281.

In exceptions to the ALJ's decision, the Board's General Counsel asserted that the Judge erred by:

> [f]ailing to find that [Conair] violated Section 8(a)(1) and (3) of the Act by discharging all of its unfair labor practice strikers as of April 22, 1977, and by failing to provide an appropriate remedy in connection therewith.

General Counsel's Exceptions to the Decision of the Administrative Law Judge at 2 (November 14, 1980).[59]

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[59] This exception first appeared in the record in the Counsel for the General Counsel's Memorandum in Opposition to the Proposed Settlement Agreement at 5, dated October 18, 1979. In September 1979, over a year after the hearing before the ALJ closed, Conair and the Union negotiated a settlement that included a provision stating that Conair would not be

The Union filed a similar exception, and specifically asserted that Conair should have been ordered "to make all of the [affected] unfair labor practice strikers . . . whole for any loss of pay commencing April 22, 1977 until the date of a bona fide offer of reinstatement." Charging Party's Exceptions to the Decision of the Administrative Law Judge at 2 (November 7, 1980).

The Board unanimously affirmed the ALJ's determination that the mailgram unlawfully threatened striking employees with discharge in violation of 8(a)(1). We agree that the record fully supports the ALJ's conclusion, and Conair does not seriously argue otherwise. Three of the Board's five members, however, further determined that the ALJ's conclusion should be augmented in line with the exception pressed by the General Counsel and the Union; these members cited record evidence supporting the contention "that the April 20 mailgram also violated Section 8(a)(3) and (1) of the Act by unlawfully terminating the striking employees." 261 NLRB at 1189-90.

Conair, in its brief responding to the General Counsel's and Union's exception, had objected that the pleadings failed to alert it to the presence of an actual termination issue stemming from the mailgram. The Board's majority declared as its answer to this lack of notice objection:

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liable for back pay. Opposing the settlement, the General Counsel stated his view that Conair owed the unfair labor practice strikers back pay from April 22, 1977, until their reinstatement. Ultimately, the settlement agreement collapsed.

The General Counsel's cryptic reference in October 1979 to the issue stated with precision in his November 1980 exceptions does not indicate timely notice to Conair; although the ALJ's opinion did not issue until July 1980, the hearing ended on June 2, 1978. Notice adequate to provide a fair opportunity to defend must occur before, not after, the record is closed.

> Although [Conair] asserts that it had no notice that the April 20 mailgram would be litigated as a violation of Sec. 8(a)(3), the complaint specifically alleges that the mailgram threatened employees with discharge in violation of Sec. 8(a)(1), and *other paragraphs of the complaint allege that other conduct by [Conair] violated Sec. 8(a)(3).* Further, in its exceptions, [Conair] argued that the law and the interpretation of the facts now in the record do not support the finding of a violation. [Conair] does not argue that it was precluded from adducing any exculpatory facts or that it would have altered its presentation of the case in any manner. Accordingly, we find no merit to [Conair's] contentions since the issue was fully litigated and all of the operative facts underlying the finding of a 8(a)(3) and (1) violation are present in the record.

261 NLRB at 1190 n.5 (citing *Southern Newspapers, Inc.*, 255 NLRB 154, 154 n.1 (1981)) (emphasis added).

Board Member Hunter, joined by Chairman Van de Water, dissented from the majority's extension of the ALJ's decision on the mailgram episode. They reasoned:

> [T]he discharge issue was initially raised in the [Union's] charge but was not alleged as an unfair labor practice in the [Regional Director's] complaint, [thus leading Conair] to believe that the discharge issue was not before the Board. Sec. 3(d) of the Act vests the authority to issue unfair labor practice complaints with the General Counsel, and in this case the General Counsel saw fit not to allege that the mailgram had violated the Act by unlawfully discharging [Conair's] striking employees. . . . [T]his is not the type of case where, during the hearing, the General Counsel discovers previously unavailable evidence indicating additional unfair labor practices. . . . [T]he General Counsel had long been aware of the existence of the mailgram. . . . [I]t is patently unfair to permit the General Counsel to raise the discharge issue at such a late stage, and

> after the record has been closed. . . .[W]e can only speculate as to how [Conair] might have changed its litigation strategy or presented its facts differently if the discharge issue, with its substantial backpay liability, had been timely raised. Once the record has been closed, and, if you will, all bets called, it is too late to raise the ante and attempt to collect additional chips.

261 NLRB at 1199 n.39.

B. *Analysis*

We agree with the dissenting Board members that the critical issue is not whether there is substantial evidence in the record indicating that the mailgram occasioned actual termination of the strikers' employment. That issue, we believe, should not have been reached by the Board, for Conair was never told before the hearing record closed that the stakes included liability for discharges effected on April 22, 1977. The Union opened the matter by charging that the mailgram episode spelled discharge, and not the mere threat of such action. But the complaint adjudicated by the ALJ, although amended in several particulars both before and during the course of the hearing, never asserted more than the threat of termination in violation of 8(a)(1). And the ALJ, who canvassed the case thoroughly in an extraordinarily detailed decision, apparently did not regard actual discharge as a matter fairly posed for resolution.

It will not do to assert, as the Board's majority did, that "other paragraphs of the complaint allege[d] that other conduct by [Conair] violated Sec. 8(a)(3)." 261 NLRB at 1190 n.5. If anything, such "other paragraphs" might have reinforced Conair's anticipation that it faced only an 8(a)(1), not an 8(a)(3), contention in relation to the mailgram. Nor do we believe it was Conair's burden to show that, had it been accorded due notice of an actual discharge claim based on the mailgram, it could

have "adduc[ed] . . . facts" or "altered its presentation" to defeat the claim. *See id.* Here, as in *McLean-Behm Steel Erectors, Inc. v. Occupational Safety and Health Review Commission*, 608 F.2d 580, 582 (5th Cir. 1979), "because the record . . . does not reveal uncontrovertibly that petitioner could not have prevailed in any defense to [the 8(a)(3)] charge, we find prejudice requiring reversal." [60]

We stress that we do not rest on the notion that the NLRB's General Counsel is rigidly bound by his initial statement of a complaint or even his successively amended pleadings. Rule 15(b) of the Federal Rules of Civil Procedure provides an apt analogy. Under Rule 15(b), pleadings can be amended to conform to the evidence, even after judgment, when "issues not raised [therein] are tried by express or implied consent of the parties." FED. R. CIV. P. 15(b). Indeed, formal amendment is unnecessary to preserve the result of a fair trial of an issue that the parties in fact have agreed to litigate. But it must be "clear that the parties understand exactly what the issues are when the proceedings are had." *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, 842 (D.C. Cir. 1950).

Further, the presence of evidence in the record to support a charge unstated in a complaint or any amendment thereto does not mean the party against whom the charge is made had notice that the issue was being litigated. "[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue." *Cioffe v. Morris*, 676 F.2d 539, 542 (11th Cir. 1982) (quoting *International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977)).

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[60] *See* Jimenez v. Tuna Vessel "Granada", 652 F.2d 415, 420 (5th Cir. 1981) ("[E]ach party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no[t] . . . favored . . . .").

Because it is the "[a]ctuality of notice . . ., not the technicality, [that] govern[s]," *Kuhn v. Civil Aeronautics Board*, 183 F.2d at 842, pleading amendments may be tendered on appellate review. *See* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1494, at 476-78 (1971). But "if the record is incomplete or if it is uncertain whether the party opposing the motion to amend had notice of the unpleaded issue at the trial stage, the appellate court should render its decision in conformity with the issues relied upon by the lower court in reaching its judgment." *Id.* at 478.

It is at least uncertain whether Conair had fair notice or understood that the discharge issue was part of the case tendered to the ALJ. The ALJ, who did not even mention the issue in an otherwise exhaustive set of findings and conclusions, evidently did not perceive that the question had been tried "by express or implied consent." *See* FED. R. CIV. P. 15(b). Under the circumstances presented here, the Board, acting as an appellate body, should have "render[ed] its decision in conformity with the issue[]" as framed and resolved by the ALJ. *See* 6 C. WRIGHT & A. MILLER, *supra*, at 478. We conclude, for the reasons stated, that the Board erred in "finding that [Conair] violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging its striking employees on April 22, 1977," 261 NLRB at 1190, and in modifying the ALJ's proposed remedy to conform to that Board finding.

IV. CONAIR ENGAGED IN "OUTRAGEOUS" AND "PERVASIVE" UNFAIR LABOR PRACTICES NOT OFFSET BY UNION MISCONDUCT

Two determinations underlie the Board's remedial directives: first, a fair election could not be held in the wake of Conair's "outrageous" and "pervasive" violations

of the NLRA; second, the Union did not engage in sufficiently grave misconduct to preclude the issuance of any bargaining order that might otherwise be appropriate. The evidence credited in the administrative proceedings,[61] and prior NLRB and court decisions, support both determinations. Neither is vulnerable under the deferential standard of review we apply when the Board engages in a reasoned exercise of its expert judgment. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32, 615-16 (1969); *Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803, 807 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 907 (1976).

A. *Conair's Conduct*

The ALJ concluded that "the extensive unfair labor practices committed by [Conair] . . . are so 'outrageous' and 'pervasive' as to . . . render[] impossible a fair election." 261 NLRB at 1285. The NLRB accepted the ALJ's conclusion[62] as congruent with the Board's analysis of Conair's conduct in terms of four variables: the gravity of the Company's violations, the extent to which their coercive effect pervaded the bargaining unit, their timing, and the degree to which Conair repeated them.[63]

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[61] *See supra* pp. 5-18.

[62] Member Hunter disagreed; in his opinion extraordinary notice and access provisions would provide an adequate remedy. 261 NLRB at 1199. Chairman Van de Water's position on this issue is unclear. *See id.* at 1195.

[63] These variables derive from the NLRB's decision in United Dairy Farmers Coop. Ass'n, 257 NLRB 772, 773-75 (1981) [hereafter, *United Dairy II*], the only other case in which the Board has ordered an employer to bargain with a union that never obtained even a card majority. *See* 261 NLRB at 1192 (Board Opinion). The *United Dairy II* decision also identified a history of employer misconduct as relevant to determining whether a fair election is possible. *See United Dairy II*, 257 NLRB at 773. The Board acknowledged the absence of evidence in the instant case that the Company engaged in unfair labor practices prior to the events at issue. *See* 261 NLRB at 1192 n.16.

The Board referred first to the gravely coercive nature of Conair's unfair labor practices, stressing the Company's threats to close the plant and its reprisals against striking employees. *Id.* at 1192.[64] Next, the Board noted that the Company's violations were constantly repeated. Further, the Board observed that the unlawful practices began at a high level of intensity shortly after the Union's organizational drive commenced, continued over an eight month period, intensified as the election neared, and even occurred several times after the election. *Id.* at 1193. Finally, the Board cited the conspicuous involvement of Conair's highest officials and the use of mass meetings and publications as factors serving to insure that the coercive impact pervaded the bargaining unit. *Id.* The confluence of factors thus identified by the Board is undergirded by substantial evidence on the record as a whole, *see, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1011 (D.C. Cir. 1981),[65] and adequately justifies the conclusion that Conair's conduct fell into the most egregious category.

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[64] The Board pointed to the threats to discharge the striking employees, the refusal to reinstate certain strikers, the delay in reinstating the other strikers, the subsequent discharge of several reinstated strikers, and the threats to close the plant as the most coercive of Conair's numerous violations. *See* 261 NLRB at 1192-93.

The Board majority also emphasized its determination that the April 20 mailgram resulted in the actual discharge of all striking employees on April 22. *See id.* at 1192. We have rejected that determination because it was made without fair notice to Conair. *See supra* pp. 23-32. We do not regard the "actual discharge" determination as critical, however, *cf.* Pedro's, Inc. v. NLRB, 652 F.2d 1005, 1011-12 (D.C. Cir. 1981), because the Board majority concluded in the alternative that Conair's conduct precluded a fair election even if the Company did not discharge all the striking employees on April 22. *See* 261 NLRB at 1193 n.18.

[65] *See supra* pp. 20-22 (ALJ's findings underlying the factors identified by the Board are supported by substantial evidence).

Prior NLRB and court decisions sustain the Board's judgment as to the character and impact of Conair's conduct. Precedent acknowledges the gravity of threats to close a plant. *See, e.g., Sinclair Co. v. NLRB*, 395 U.S. 575, 588-89, 611 n.31, 615 (1969) (threats of plant closure alone provide sufficient justification for majority bargaining order); *Donn Products, Inc. v. NLRB*, 613 F.2d 162, 166 (6th Cir.) (plant closure is one of the most coercive threats company can make during an election), *cert. denied*, 447 U.S. 906 (1980); *Chemvet Laboratories, Inc. v. NLRB*, 497 F.2d 445, 448 (8th Cir. 1974) (same); *Wright Plastic Products, Inc.*, 247 NLRB 635, 635 (1980) (same); *Rapid Manufacturing Co.*, 239 NLRB 465, 466 (1978) (same), *enforcement denied in part*, 612 F.2d 144 (3d Cir. 1979). Reprisals against union proponents are similarly recognized as highly coercive. *See, e.g., Jim Baker Trucking Co.*, 241 NLRB 121, 122 (1979) ("threat of termination is a serious unfair labor practice, [and] the effectuation of such a threat is even more serious"), *enforced mem.*, No. 79-7163 (9th Cir. Aug. 8, 1980); *cf. First Lakewood Associates v. NLRB*, 582 F.2d 416, 424 n.5 (7th Cir. 1978) (it is generally but not universally true that "section 8(a)(1) violations are less serious and have less residual impact than . . . section 8(a)(3) violations"). The numerosity of 8(a)(1) violations has figured prominently as well in estimating the coercive impact of an employer's unlawful anti-union activities. *See United Oil Manufacturing Co. v. NLRB*, 672 F.2d 1208, 1213 (3d Cir.), *cert. denied*, 103 S.Ct. 446 (1982); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1003 (10th Cir. 1977); *Jim Baker Trucking Co., supra*; *see also NLRB v. Ely's Foods, Inc.*, 656 F.2d 290 (8th Cir. 1981) (majority bargaining order upheld where employer committed only 8(a)(1) violations).

Case law further recognizes that the possibility of a fair rerun election is reduced when high corporate officials

participate in the unfair labor practices, *see, e.g., Rapid Manufacturing Co. v. NLRB*, 612 F.2d 144, 149 (3d Cir. 1979); *Wright Plastic Products, Inc.*, 247 NLRB 635, 635 (1980), and when the violations affect most of the unit employees. *See, e.g., Electrical Products Division of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1003 (10th Cir. 1977). Repetition of unfair labor practices, practical judgment suggests, reinforces their coercive effect. *See also NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 601 (9th Cir. 1979) ("[r]epeated and drastic nature of the coercive behavior" warrants majority bargaining order as remedy), *cert. denied*, 445 U.S. 915 (1980).

Two additional considerations fortify our view that we have no cause in this case to second guess the NLRB's expert appraisal of the quality and effects of Conair's unlawful activities. First, this case in several respects is similar to the one other case in which the Board concluded a nonmajority bargaining order was necessary because an employer's "outrageous" and "pervasive" unfair labor practices precluded a fair return election (*United Dairy Farmers Cooperative Association*, 257 NLRB 722 (1981)),[66] and it is distinguishable from cases in which

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[66] *United Dairy II* differs from this case in that the employer there had a prior history of unfair labor practices, discharged over 20% of the bargaining unit (including the primary union activist), and even threatened physical violence on a single occasion. However, the two cases have these common features: in both, the company president (as well as others) repeatedly threatened discharges and plant closure; the company actually discharged employees, granted benefits, coercively interrogated employees, and created the impression of surveillance; the company responded swiftly and severely to the beginning of the unionization drive and continued committing unfair labor practices over an extended period; and in

the Board did not reach that conclusion.[67] *Cf. NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100, 1104-05 (2d Cir. 1979) (one reason for remand is Board's failure to explain apparent inconsistency of issuing a bargaining order when Board had not issued such an order in similar cases). Second, Conair's misconduct was more "outrageous" and "pervasive" than the misconduct demonstrated in other cases in which this court affirmed the Board's decision to issue a majority bargaining order because prospects for a fair rerun election appeared dim. *See Road Sprinkler Fitters Local Union No. 669 v. NLRB*,

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both cases the coercive message was effectively spread throughout the bargaining unit. Moreover, unlike the employer in *United Dairy II*, Conair also engaged in extensive solicitation of employee grievances, threatened to terminate a variety of employee benefits, and delayed reinstatement of unfair labor practice strikers. *Compare United Dairy II*, 257 NLRB at 772-74 *with* Part I, *supra* pp. 5-17.

The NLRB has found "outrageous" and "pervasive" employer misconduct in other cases. *See, e.g.*, Sambo's Restaurant, Inc., 247 NLRB 777, 777 (1980), *enforced*, 641 F.2d 794 (9th Cir. 1981). The Board decided these cases, however, when it did not yet claim the authority to issue nonmajority bargaining orders to remedy such conduct. Consequently, it is not clear that the Board analyzed the situations presented with the rigor necessary to determine whether a nonmajority bargaining order, if within the Board's remedial authority at all, is appropriate. *See* Lankford, *Nonmajority Bargaining Orders: A Study in Indecision*, 46 ALBANY L. REV. 363, 395 (1982).

[67] *See* Belcher Towing Co., 265 NLRB No. 159, slip op. (1982) (although company was a recidivist, there were no discharges, mass threats of discharge, or threats of plant closure; company president did not personally participate in unfair labor practices; unionization effort occasioned no immediate response; and fewer nondischarge § 8(a)(3) violations occurred); Paul Distributing Co., 264 NLRB No. 179, slip op. (1982) (although two of seven unit employees were discharged, company recalled union activist five days later; no threats were made to the unit en masse; and individual threats made three days after discovery of the unionization effort were not repeated thereafter); United Supermarkets,

681 F.2d 11, 24 (D.C. Cir. 1982) (no threats of plant closure, no threat of losing benefits, no solicitation of grievances, no promises or grants of benefits, fewer threats of discharge), *cert. denied*, 103 S.Ct. 831 (1983); *Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803, 806-07 (D.C. Cir. 1975) (no 8(a)(3) violations, no threats of discharge, no solicitation of grievances, no interrogations, no impression of surveillance, no threat to withdraw benefits, fewer promises and grants of benefits), *cert. denied*, 426 U.S. 907 (1976); *Southwest Regional Joint Board, Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1034-35 (D.C. Cir. 1970) (no threats of plant closure, no threats of discharge, no solicitation of grievances, no impression of surveillance, no involvement by company president, fewer 8(a)(3) violations, fewer promises and grants of benefits, and fewer threats to withdraw benefits).[48]

B. *The Union's Misconduct*

It is not disputed that, on three days in the course of the five and one-half month long strike, significant episodes of striker violence occurred. Picketing was massive and disorganized on the opening days, April 11 and 12. Employees attempting to cross the picket line encountered pushing and shoving. Uncontrolled strikers threw rocks, obstructed traffic, slashed tires, and smashed windshields. Several workers sustained minor injuries. These chaotic

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Inc., 261 NLRB 1291 (1982) (unfair labor practices subsided several months prior to election; company did not communicate threats en masse; high level officials did not make threats; and geographical separation of bargaining unit members diffused coercive impact); Fred Lewis Carpets, Inc., 260 NLRB 843 (1982) (no solicitation of grievances, or surveillance; and company committed all violations on single day).

[48] This court also approved a majority bargaining order in Oil, Chemical & Atomic Workers Int'l Union v. NLRB, 445 F.2d 237, 246-47 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972), a case involving numerous and sustained highly coercive unlawful practices.

incidents, the ALJ found, were not Union-planned. *See* 261 NLRB at 1219-26, 1287 nn. 453, 456.

On the evening of July 21, the arrival of a truck at Conair's premises for no apparent business reason occasioned a further violent incident. The truck driver was assaulted and his truck was damaged. *See id.* at 1232-36.

The ALJ determined from the testimony that "victims" provoked some of the strikers' misconduct and that Conair's own unlawful activities created a "volatile situation." *See id.* at 1287 n.456. He further found that, following the chaotic first two days of the strike, violence subsided. *See id.* In the long stretch from April to September, the ALJ concluded, the "strike was generally conducted in a peaceful manner with no significant picket line misconduct." *Id.* at 1287.[69]

We do not decide in this case whether, as a general rule, grave union misconduct, even if offset by more egregious employer misconduct, precludes Board imposition of a remedial bargaining order. *Compare NLRB v. Triumph Curing Center*, 571 F.2d 462, 476 (9th Cir. 1978), *and Donovan v. NLRB*, 520 F.2d 1316, 1321 (2d Cir. 1975) (in deciding propriety of majority bargaining order Board should balance "effect of the Company's violations against the gravity of the Union's misconduct"), *cert. denied*, 423 U.S. 1053 (1976), *with* Note, *Union Violence & Bargaining Orders: A New Approach to* Laura Modes, 127 U. PA. L. REV. 1640, 1658-65 (1979) (advocating exclusive focus on gravity of union misconduct).[70] We address only the circumstances at

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[69] On review of the record, we concluded that substantial evidence supports the ALJ findings underlying these observations. *See supra* pp. 20-22.

[70] For the Board's five-factor balancing approach to the problem, see Maywood Plant of Grede Plastics, 235 NLRB 363, 365 (1978).

The Board has declined to issue majority bargaining orders when the union's misconduct was considerably more serious,

hand: when a strike is generally peaceful, marred only by outbursts of violence contained within a short span and not traced to union direction, we are not prepared to declare the Board's issuance of an otherwise appropriate bargaining order an abuse of discretion.

V. REMEDIES

For the reasons stated in Part III, *supra*, we decline to enforce the portion of the Board's "make whole" directives predicated upon the alleged discharge of strikers on

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and the employer's considerably less grave, than the misconduct demonstrated in this case. *See* Allou Distribs., Inc., 201 NLRB 47 (1973) (six union agents entered plant and then deliberately threatened and intimidated all ten unit employees until they withdrew decertification petition; employer violated § 8(a)(1) and § 8(a)(5) by soliciting decertification petition, promising improved benefits, and refusing to bargain); Aircraft Mantel & Fireplace Co., 174 NLRB 737 (1969) (union deliberately engaged in extended campaign of intimidation and property damage; employer violated § 8(a)(5) by refusing to bargain); Laura Modes Co., 144 NLRB 1592 (1963) (union representatives beat one partner inside plant, "pushed around" employee trying to call police, and on a later date beat another partner outside plant; employer violated § 8(a)(1) and § 8(a)(5) by coercively interrogating employees, threatening discharge, soliciting employees to withdraw from union, and refusing to bargain).

For court rulings refusing to enforce majority bargaining orders after union misconduct, see NLRB v. World Carpets, 463 F.2d 57 (2d Cir. 1972) (picketers threatened nonstrikers with sticks and chased plant managers in cars; low level supervisor on one occasion promised employees a benefit and on another stated that company president would close warehouse rather than accept union); NLRB v. United Mineral & Chemical Corp., 391 F.2d 829 (2d Cir. 1968) (union representative and numerous pickets grabbed one employee, knocked another to ground, and beat owner so severely that he required over five months hospitalization; employer violated § 8(a)(1) and § 8(a)(3) by discharging one employee, creating the impression of surveillance, and soliciting an employee to engage in surveillance).

April 22, 1977.[71] We explain below why, despite our acceptance of the Board's evaluation of Conair's conduct as "outrageous" and "pervasive," we reject the Board's nonmajority bargaining order remedy. In all other respects, we uphold the Board's remedial order. We divide our discussion of the Board-imposed remedies into three parts: (1) the bargaining order; (2) extraordinary notice and access remedies generally; (3) the requirement that Conair's president personally read the Board's remedial notice to an assembly of current employees.[72]

A. *The Nonmajority Bargaining Order*

In 1980, for the first time in the long history of the NLRA,[73] a court squarely held that the NLRB has the

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[71] Other "make whole" directives require Conair to: (1) reinstate all discriminatorily discharged strikers with appropriate back pay awards computed from the day of their unconditional offer to return to work; (2) make whole all previously reinstated strikers for any loss of pay resulting from the Company's discriminatory delay in reinstating them after their unconditional offer to return to work; and (3) rehire all strikers reinstated after the strike but subsequently discharged, with appropriate back pay awards. *See* 261 NLRB at 1195 (Board Opinion); *id.* at 1283, 1289 (ALJ Opinion). These requirements are unquestionably within the Board's broad remedial power. *See generally* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187-200 (1941).

[72] As stated earlier, *supra* p. 4, our positions diverge on the Board directives listed above first and third. Judge Ginsburg and Judge Scalia hold that the Board lacks authority to issue a nonmajority bargaining order; Judge Wald would enforce the Board's bargaining order for the reasons stated in her dissenting opinion. Judge Wald and Judge Scalia, for the reasons set out by Judge Wald in Part V.C of this opinion, uphold the Board's presidential reading directive; Judge Ginsburg dissents on this issue.

[73] The Act has been in effect since 1935. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976)).

authority to issue a bargaining order despite the absence of tangible evidence that the union ever secured the support of a majority of the affected employees.[74] The full Board itself did not rule unequivocally on the question until 1982, in the case at hand.[75] The issue is vexing[76]

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[74] United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980); *cf.* NLRB v. Empire Corp., 518 F.2d 860, 863 n.3 (6th Cir. 1975) (stating in dictum that "[i]t is clear that the Board may, where it finds egregious unfair labor practices, enter a bargaining order even though the union is unable to demonstrate that it represents a majority") (citations omitted); J.P. Stevens & Co. v. NLRB, 441 F.2d 514, 521-22 (5th Cir. 1971) (strongly suggesting same in dictum). A panel of this court, although leaving the question open because the case before it did not require resolution of the "conundrum . . . even preliminarily," noted that it "d[id] not share [the Third Circuit panel's] confidence that the Board's [general remedial] authority is so broad" as to embrace the power to order an employer to bargain with a union that has not concretely demonstrated majority support. Teamsters Local 115 v. NLRB, 640 F.2d 392, 397 n.7, 398 (D.C. Cir.), *cert. denied*, 454 U.S. 827 (1981).

[75] The remand in *United Dairy, supra*, was disposed of by a panel consisting of only three of the five Board members. Two of these adhered to their earlier position that the NLRB possesses authority to issue a nonmajority bargaining order; the third "recognized the Third Circuit's decision as binding upon the Board for the purpose of deciding that case." *Conair Corp.*, 261 NLRB 1189, 1191 n.14 (1982) (discussing *United Dairy II*). Thus, a majority of the Board has never, until this case, issued a nonmajority order on the basis of its own assessment that it has authority to do so.

[76] Commentary, while generally favoring nonmajority bargaining orders in egregious cases, is far from unanimous. *Compare* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 132-39 (1964), Golub, *The Propriety of Issuing* Gissel *Bargaining Orders Where the Union Has Never Attained a Majority*, 29 LAB. L.J. 631 (1978), *and* Note, United Dairy Farmers Cooperative Association: *NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-*

because it trenches upon employee freedom of choice, a matter at the very center of our national labor relations policy. Nonmajority bargaining orders pose this dilemma: if the Board lacks authority to issue them, employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal; if the Board has the authority and exercises it to sanction patent and incessant employer unfair labor practices, employees may be saddled for a prolonged period [77] with a union not enjoying majority support.[78] Absent a card

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Union Majority, 80 COLUM. L. REV. 840 (1980) (all advocating Board authority to issue nonmajority bargaining orders), *with* Hunter, Conair: *Minority Bargaining Orders Usher in 1984 at NLRB*, 33 LAB. L.J. 571 (1982), Ostan, *Bargaining Orders*: Gissel *and* United Dairy Farmers *Revisited*, 8 EMPLOYEE REL. L.J. 198 (1982), *and* 49 GEO. WASH. L. REV. 780 (1981) (all questioning Board authority to issue nonmajority bargaining orders).

[77] A union recognized on the basis of a nonmajority bargaining order does not qualify for the one-year protection from decertification and competing union election petitions enjoyed by unions certified in a valid Board election. *See* National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (1976). However, the Board has consistently held that an employer under order to bargain with a union must do so for *a reasonable time period* (generally one year), without regard to the union's majority status. *See, e.g.*, Keller Plastics E., Inc., 157 NLRB 583, 587 (1966); Poole Foundry and Mach. Co., 95 NLRB 34, 36 (1951). *See also* Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944) ("[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."). Moreover, once the union and employer have signed a collective bargaining agreement, the Board's contract bar rules presumably will bar a new election in that bargaining union for the duration of the agreement, provided it lasts no longer than three years. *See* General Cable Corp., 139 NLRB 1123 (1962).

[78] Board members who doubt or deny the NLRB's authority to issue nonmajority bargaining orders have pointed out that employees vote against collective representation in more than

majority the Board cannot estimate with any degree of reliability how the employees would have responded in a free election.[79] Inevitably, therefore, a nonmajority bar-

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half of all Board elections. *See Conair*, 261 NLRB at 1197 & n.35 (1982) (Chairman Van de Water, concurring in part and dissenting in part) (quoting United Dairy Farmers Coop. Ass'n, 242 NLRB 1026, 1043 n.65 (1979) (hereafter, *United Dairy I*) (Member Penello, concurring in part and dissenting in part) and citing 1978 and 1980 NLRB annual reports).

On the relationship between union authorization cards and election results, the Fourth Circuit said in NLRB v. S.S. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967):

> In 1962, Board Chairman McCullock presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections.

Id. at 565 (footnote omitted). The Board recently reported that this data has not been updated. *See* Letter from John C. Truesdale, Executive Secretary, NLRB, to Carl L. Taylor, attorney for Chamber of Commerce (Sept. 29, 1982), *reprinted in* Brief of the Chamber of Commerce of the United States as Amicus Curiae at A-1 app.

[79] When the union has achieved a card majority, the Board assumes a remedial bargaining order rectifies the employer's illegal conduct by restoring the *status quo ante*. *See Conair*, 261 NLRB at 1196-97 (Chairman Van de Water, concurring in part and dissenting in part). That assumption cannot be indulged when a majority of the employees has never manifested approval of unionization. *See id.* at 1198 (Member Hunter, concurring in part and dissenting in part) (union election campaigns are "subject to ebb and flow in employee sentiment that as often as not has little to do with conduct, lawful or otherwise, engaged in by one of the parties") (footnote omitted); *cf.* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L.

gaining order replaces employee freedom of choice with a government agency's educated guess that the employees will fare better with a union than without one.[80]

Nothing now in the text of the governing statute, or in its legislative history, suggests that Congress contemplated general authority in the Board to select or designate a union for employees, a majority of whom never signaled assent to the arrangement. Nor do lower court judges have secure guidance from the Supreme Court on this issue.

To discourage employer lawlessness, arguably the NLRB should be positioned to choose for the employees when the prospect of an untainted election, held within a reasonable time frame, appears remote. We recognize the appeal of the position that a nonmajority bargaining order may be the only potentially effective means to check

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REV. 1769, 1786 (1983) (citing W. Dickens, Union Representation Elections: Campaign and Vote 108 (Oct. 1980) (unpublished Ph.D. dissertation, Department of Economics, Massachusetts Institute of Technology)) (unions would have won only 46-47% of elections studied if employer had campaigned entirely cleanly); *supra* note 78 (unions lose a majority of elections even when authorization cards have been signed by 50-70% of the affected employees).

[80] The Board's majority observed that a substantial card showing, such as the "approximately 46 percent" shown in this case, shored up an NLRB-imposed bargaining order. 261 NLRB at 1194. However, the Board did not deem critical to its issuance of a bargaining order "any . . . affirmative showing of a reasonable basis for projecting a union's majority support." *Id. But cf.* Bok, *supra* note 76, at 138 (nonmajority bargaining order remedy should be confined to "cases in which there is a reasonable possibility that the union would have ultimately prevailed in the absence of the employer's unlawful acts"). Instead, "[t]he critical predicate to issuance of a nonmajority bargaining order," the Board reasoned, is its finding that the employer's exceptional conduct has "foreclosed the possibility of a fair representation election." 261 NLRB at 1194.

an employer's unlawful conduct designed to nip a union's organizing campaign in the bud.[81] Nonetheless, we believe that the statutory gap we face is too deep for an agency or court to fill. A fundamental policy choice is at stake: Is it ever appropriate to substitute an agency's "big (even if good) brother" judgment for a majority of employees' express choice of a bargaining representative? That basic decision, we believe, should be left to Congress, as the organ of government accountable to the people for establishing the main lines of our national labor relations policy.

1. The *Gissel* dictum

The Supreme Court has not yet confronted a case requiring it to decide whether the NLRB has the power to issue a bargaining order where the union has not shown majority status. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969), however, the High Court, citing dictum from *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), appeared to contemplate the possibility of such an order.

Gissel itself reversed a Fourth Circuit decision which had refused to sanction a bargaining order despite serious employer misconduct and in face of proof that the union had once obtained authorization cards from a majority of employees.[82] The Court observed, nonetheless, that its views and those of the Fourth Circuit were not far apart:

> [T]he actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate

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[81] *But cf.* Weiler, *supra* note 79, at 1795 (bargaining order imposed by the NLRB years after a union's organizing drive is "highly unlikely" to "produce a viable and enduring collective bargaining relationship").

[82] Four cases were consolidated for decision in *Gissel*; all four involved card majorities.

> the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, *without need of inquiry into majority status on the basis of cards or otherwise*, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."

Gissel, 395 U.S. at 613-14 (quoting *Logan Packing*, 386 F.2d at 570) (emphasis added).

As the Supreme Court recognized, the Fourth Circuit's decisions in both *Gissel* and *Logan Packing* generally disfavored remedial bargaining orders. Indeed, the *Logan Packing* dictum indicated the Fourth Circuit's uncertainty whether a nonmajority bargaining order could be reconciled with the statute even in the most egregious circumstances: "[I]n light of the guaranty of [NLRA] § 7 of employees' rights not to be represented [the use of a nonmajority bargaining order], *if ever appropriate*, must be reserved for extraordinary cases." 386 F.2d at 570-71 (footnote omitted) (emphasis added).

The Supreme Court's *Gissel* dictum, reciting Fourth Circuit dictum, has been read to encompass cases with two characteristics: the employer's conduct falls into the most egregious category; the union's campaign at no point achieved a card majority.[83] Cases with these

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[83] *See, e.g., Teamsters Local 115*, 640 F.2d at 396-97.

The Supreme Court's reference in *Gissel* to the possibility of Board-imposed bargaining orders "without need of inquiry into majority status" perhaps has been read to indicate more than the Court intended. Prior to its reference to the Fourth Circuit's *Logan Packing* dictum, the Supreme Court had set out its reasons for disagreeing with the Fourth Circuit's approach "on all major issues," 395 U.S. at 613, including that

characteristics are commonly described as *Gissel* "category one" cases.

Circuit's distrust of union authorization cards, its view that the 1947 Taft-Hartley amendments had ruled out bargaining orders on the basis of card majorities, and its refusal to accept the Board's *Cumberland Shoe* doctrine. *Id.* at 595-610. The Court then softened its multiple rejections of Fourth Circuit positions by pointing out that the Circuit had "left open the possibility" of issuing bargaining orders without inquiry into majority status in sufficiently egregious cases. *Id.* at 613; *see Logan Packing*, 386 F.2d at 570 (Board "may have the power" to impose a bargaining order as a remedy for egregious unfair labor practices).

Because *Logan Packing*, in dictum, had raised the possibility of Board-imposed bargaining orders in "exceptional cases" marked by "outrageous" and "pervasive" unfair labor practices, the Supreme Court in *Gissel* was able to say that "the actual area of disagreement between our position here and that of the Fourth Circuit is not large." *Gissel*, 395 U.S. at 613. Thus, the High Court's concentration apparently was on the quality of employer conduct *Logan Packing* indicated might justify a bargaining order, not on the notion that such an order could issue "without need of inquiry into majority status."

The probability that the High Court referred only casually to dispensing with inquiry into majority status is heightened by the statement the Court made immediately after it set out the *Logan Packing* dictum:

> The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.

Gissel, 395 U.S. at 614. The Court cited two cases as illustrative of the Board's policy: United Steelworkers of America v. NLRB, 376 F.2d 770 (D.C. Cir. 1967), and J.C. Penney Co. v. NLRB, 384 F.2d 479, 485-86 (10th Cir. 1967). Both involved employer misconduct designed to destroy the union's *card majority*.

The Supreme Court's holding in *Gissel*, however, is confined to a second category,[84] cases in which the union shows that at one point it had majority employee support:

> The *only* effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, *we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.* In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that *employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order*, then such an order should issue.

395 U.S. at 614-15 (emphasis added) (citation omitted). The Court thus anchored its holding in *Gissel* to the NLRA's core principle that a majority of employees should be free to accept or reject union representation. A bargaining order in a "category two" case, the Court reasoned, not only "deter[s] employer misbehavior," it "effectuat[es] ascertainable employee free choice."

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[84] A third category *Gissel* mentioned includes violations not serious or extensive enough to warrant a bargaining order because remedies concededly within the Board's authority would adequately ensure a fair election. *See* 395 U.S. at 615.

In "category one" cases, by contrast, the employees' free choice is not ascertainable. There is tension between the objective of deterring unfair labor practices and effectuating *expressed* majority sentiment. Dictum reciting dictum, we believe, is not a reliable indicator of the Court's probable view on a tense issue. "[A]ll that can fairly be said [of the *Gissel* dictum] is that the Court left open the issue of whether the Board has the statutory authority to issue a bargaining order in the absence of a showing that the union ever enjoyed majority support." [8] In deciding that issue, the statute itself should be our dominant guide.

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[8] *United Dairy I*, 242 NLRB at 1040 (Member Penello, concurring in part and dissenting in part), *quoted in Conair*, 261 NLRB at 1196 (Chairman Van de Water, concurring in part and dissenting in part).

Judge Wald suggests that in *Sinclair*, one of the four cases the *Gissel* opinion resolved, the Supreme Court in fact approved issuance of a bargaining order without inquiry into the union's majority status. *See* Wald dissent at 10-11. She apparently reads the Supreme Court's words, "even in the absence of a § 8(a)(5) violation," to mean "without need of inquiry into majority status." We do not comprehend why these statements should be regarded as synonymous. At the time the Court decided *Gissel*, Board doctrine had it that an employer could in good faith refuse to bargain in face of a union's proffer of a card majority without committing an 8(a)(5) violation. *See, e.g.*, Aaron Bros. Co., 158 NLRB 1077 (1966). Thus, an 8(a)(5) violation required a card majority *plus* something more—employer bad faith in rejecting a bargaining request. When the *Gissel* Court, in discussing *Sinclair*, said a bargaining order could issue "even in the absence of a § 8(a)(5) violation" it likely meant the employer's bad faith in refusing to bargain, not the union's card majority, could be dispensed with. Supporting this interpretation is the sentence immediately following the ones quoted in Judge Wald's dissent, in which the Court explicitly referred to "the union's majority." 395 U.S. at 615. In short, the point that the union in *Sinclair* had once achieved majority support was not an item merely raised in stating the facts of the case, *id.* at 589, only to be thereafter set aside as irrelevant.

[Continued]

2. The Act's twin pillars: freedom of choice and majority rule in employee selection of representatives

The Board is charged by section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), "with the task of devising remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).[86] In performing this task, the Board has wide discretion, subject to limited judicial review. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). A prime function of that limited judicial review, however, is to ensure that the Board's decisions are consistent with the Act's basic premises. *See, e.g., H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (Board's remedial authority does not include directing an employer to accede to a particular contract clause); *cf. Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (Board exceeded its remedial authority in ordering employer to repay government for wages paid to illegally discharged workers because Board is not empowered to vindicate public rights).

Senator Wagner, architect of the original NLRA, said of majority rule:

> [D]emocracy in industry must be based upon the same principle as democracy in government. Ma-

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[86] [Continued]

While the Supreme Court's discussion of *Sinclair* is less than crisp, we doubt that more is fairly extractable from the High Court's words than this: if the employer engaged in sufficiently egregious coercive practices and the union once had majority support, then even if the employer's grave offenses do not include a § 8(a)(5) violation, a bargaining order may issue forthwith, *i.e.*, without further Board exploration of prospects for an untainted rerun election in the foreseeable future.

[86] Section 10(c) provides, in relevant part, that "the Board shall . . . take such affirmative action . . . as will effectuate the policies of the Act." National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976).

> jority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.

79 Cong. Rec. 7571 (1935). For a near half century, the Act has centrally stated:

> Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . .

National Labor Relations Act, ch. 372, § 9(a), 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 159(a) (1976)) (emphasis added). The allied freedom of choice principle also received explicit statement from the start:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through *representatives of their own choosing* . . . .

National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (1976)) (emphasis added).

In 1947, Congress responded to concerns that employees were being pressured into joining unions; it amended section 7 of the Wagner Act to provide, expressly, that employees "shall also have the right to refrain from any or all of such [concerted] activities." Labor Management Relations Act, ch. 120, § 101, 61 Stat. 136, 140 (1947). The House Report made it plain that the legislators sought to preclude the Board from imposing the agency's choice on the employees; instead, the NLRB was to respect and enforce choices—whether for or against a union—made by employees:

> A committee amendment assures that when the law states that employees are to have the rights guaran-

> teed in section 7, the Board will be prevented from compelling employees to exercise such rights against their will . . . . In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.

H.R. Rep. No. 245, 80th Cong., 1st Sess. 27 (1947). *See also* 93 Cong. Rec. 3425 (1947) (statement of Congressman Hartley) ("This bill guarantees [workers] . . . [t]he right to join with the[ir] fellow workers to select a collective bargaining agent of their own choosing, that is to say, one that is not forced upon them . . . .").

Congress has authorized one exception to the general rule that a union's selection as exclusive bargaining agent requires the advance approval of a majority of the workers. In recognition of the construction industry's unique needs, Congress amended the NLRA in 1959 to validate "prehire" agreements in that industry. *See* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, § 705(a), 73 Stat. 519, 545 (codified at 29 U.S.C. § 158(f) (1976)).[87] Section 8(f) of the Act now provides that a construction industry em-

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[87] As explained in the legislative history:

> One reason for [allowing construction industry employers to enter into prehire agreements with unions not then representing a majority of employees] is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.

H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), *quoted in* NLRB v. Local 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 348 (1978). *See also* Jim McNeff, Inc. v. Todd, 51 U.S.L.W. 4497, 4498-99 (U.S. Apr. 27, 1983) (discussing the general purpose of § 8(f) and Congress' rationale for enacting it).

ployer does not commit an unfair labor practice by signing a collective bargaining agreement with a union before the union has established majority employee support.[88] With the main rule in plain view, however, Congress expressly limited the "prehire" agreement exception: section 8(f) denies unions entering such agreements the one-year protection from election petitions accorded certified unions by section 9(c)(3). *See* National Labor Relations Act § 8(f), 29 U.S.C. 158(f) (1976).

In harmony with the intention of Congress to permit only a narrow exception to the freedom of choice - majority rule premise, Board precedent underscores the voluntary, voidable character of section 8(f) agreements: an employer who refuses to abide by an 8(f) agreement does not thereby violate the duty to bargain imposed by section 8(a)(5), *unless the union can demonstrate its majority status. See, e.g., R.J. Smith Construction Co.*, 191 NLRB 693 (1971). *See also NLRB v. Local 103, International Association of Bridge, Structural & Orna-*

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[88] [I]t shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization of which building and construction employees are members . . . because . . . the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such an agreement . . . .

National Labor Relations Act § 8(f), 29 U.S.C. § 158(f) (1976).

Outside the construction industry, an employer who recognizes a union before majority support is demonstrated commits an unfair labor practice even if the employer acted in good faith and the union in fact represented a majority of employees by the time a formal collective bargaining agreement was signed. *See* ILGWU v. NLRB, 366 U.S. 731 (1961) (upholding Board determination that employer violated NLRA §§ 8(a)(1), (2) and that union violated § 8(b)(1)(A)).

mental Iron Workers, 434 U.S. 335, 341 (1978) (prehire agreement is voidable "until and unless [the union] attains majority support in the relevant unit"), *quoted in Jim McNeff, Inc. v. Todd*, 51 U.S.L.W. 4497, 4499 (U.S. Apr. 27, 1983). In the same vein, the Supreme Court has ruled that section 8(f) agreements do not shield unions from the Act's restrictions on picketing aimed at coercing an employer into recognizing a union or at pressuring employees into selecting a particular labor organization as its bargaining representative.[89] *See Local 103, International Association of Bridge, Structural & Ornamental Iron Workers, supra*; *cf. Jim McNeff, Inc. v. Todd*, 51 U.S.L.W. at 4499-4500 (emphasizing that section 8(f) must be construed in light of Act's dominant free choice and majority rule principles).

3. Nonmajority bargaining orders are not within the NLRB's current remedial discretion

Our national labor relations policy is designed to "effectuat[e] ascertainable employee free choice" and "expressed" majority sentiment. *Gissel*, 395 U.S. at 614. A non-majority bargaining order departs from this design. Absent a union election victory or some other concrete

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[89] Section 8(b)(7) of the Act provides, in part:

> It shall be an unfair labor practice for a labor organization or its agents . . . to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees . . . .

National Labor Relations Act § 8(b)(7), 29 U.S.C. § 158(b)(7) (1976).

manifestation of majority assent to union representation, it is impossible to project the employees' choice reliably; imposition of a bargaining order in these circumstances runs a high risk of opposing the majority's will.[90] Judge Wald points out effectively in dissent that the majority's will may also be frustrated when an employer's unlawful acts have eliminated the prospect of a reliable election. She would substitute for the coercion Conair imposed an opposing coercive force imposed by the government. Without a clear direction from Congress, we are not prepared to recognize administrative authority, or arrogate power to ourselves, to remedy one possible injustice by taking the substantial chance of imposing another.

Administrative "expertise," we note, does not appear to command great weight on the question of the Board's statutory authority to issue a nonmajority bargaining order. The NLRB has seen egregious employer conduct on the order of Conair's before. Through decades of administering the Act, however, it issued, on its own initiative, no nonmajority bargaining order in response to an employer's "outrageous" and "pervasive" conduct. It did so, for the very first time, in this case; and it took that action by a bare, one-vote margin.

Today, as in the past, the NLRB is torn over the nonmajority bargaining order issue. The current three-member majority maintains that, in an atmosphere chilled by an employer's egregious anti-union behavior, a nonmajority bargaining order ultimately will enhance employee freedom of choice.[91] Two members maintain, as insistently, that "resolution of the conflict between majority rights and remedial needs by the issuance of nonmajority bargaining orders is "fraught with danger for

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[90] *See supra* notes 78 & 79.

[91] *See Conair*, 261 NLRB at 1193, 1194.

employee freedom of choice."[92] The only Supreme Court expression in point is inconclusive. Congress, the one time it authorized employer recognition of a union without a showing of majority employee support, did so within narrow confines.

If Congress wishes to add to the construction industry exception and permit the Board to impose nonmajority bargaining orders as a sanction for an employer's flagrantly unlawful anti-union campaign, it may do so with whatever qualifications it deems appropriate to prevent the Board from veering too far from the freedom of choice - majority rule premise. Given the current shape of the statute, however, we believe Congress has not placed nonmajority bargaining orders within the NLRB's remedial discretion.[93] Strong arguments can be made for and against granting the Board the authority in question. Administrators and judges, in our view, should not endeavor to anticipate or preempt debate on and decision of this issue in the political arena.[94]

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[92] *Teamsters Local 115*, 640 F.2d at 397 (referring to Member Penello's decision in *United Dairy I*). *See Conair*, 261 NLRB at 1197 (Chairman Van de Water, concurring in part and dissenting in part); *id.* at 1199 (Member Hunter, concurring in part and dissenting in part); *United Dairy I*, 242 NLRB at 1043 (Member Penello, concurring in part and dissenting in part).

[93] *Cf.* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) (while not overturning Board's ruling that employer violated § 8(a)(5) of the Act by refusing to bargain in good faith over a union-proposed dues checkoff provision, Court rejected as outside Board's remedial authority its order that employer accede to the contract clause in question).

[94] For well-presented argument that the debate over bargaining orders "is really beside the point," and that the current regulatory framework needs basic reshaping, see Weiler, *supra* note 79.

B. *Extraordinary Notice and Access Remedies Generally*

We set out earlier,[95] and restate here, a set of extraordinary notice and access provisions included in the Board's remedial order. Notice of Conair's violations and of the Board's cease and desist order, written in both Spanish and English and personally signed by the Company's president, is to be mailed to each employee at his or her home; copies are to be posted on Company premises; the notice is to be included in appropriate Conair publications; and it is to be published twice weekly for four weeks in local newspapers. For two years, Conair is to afford the Union access to Company bulletin boards, and to employees on Company premises in nonwork areas during nonwork time. A current list of employees' names and addresses is to be furnished to the Union. Also for two years, the Union is to be given notice of, and equal time and facilities to respond to, Company speeches to employees concerning union representation. Further, prior to any Board election held within two years in which the Union participates, the Union is to be permitted to deliver a 30-minute speech to employees on Company time. *See* 261 NLRB at 1195; *id.* at 1285 (ALJ Opinion).

The Board has ordered similar measures in several other cases involving pervasive patterns of illegal employer conduct. This court recently reviewed and upheld an almost identical set of provisions in *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir.), *cert. denied*, 454 U.S. 837 (1981). With respect to the appropriateness of these measures, this case is indistinguishable from *Teamsters Local 115*. We have upheld the Board's determination here that Conair's extreme conduct ruled out a fair, reliable election in the foreseeable future. *Teamsters Local 115* concerned an employer whose "numerous and egregious" unfair labor practices "may have so poisoned

[95] *See supra* note 44.

the well" that a fair election was "no longer viable." *See id.* at 396, 399-401.[96] Judge Mikva, writing for the court in *Teamsters Local 115*, cogently explained why extraordinary notice and access remedies are within the range of the Board's corrective action when employers conduct anti-union campaigns in a patently unlawful manner. We adopt his reasoning and uphold the Board's above-stated notice and access requirements.

WALD, *Circuit Judge*:

C. *The Notice-Reading Order*

The Board, following the recommendation of the ALJ, ordered the president and owner of the company personally to read aloud to the assembled employees the Board's notice of employee rights and employer obligations. *Conair Corp.*, 261 NLRB 1189, 1289 (1982). The Employer argues that this requirement is punitive, oppressive and unwarranted. We are aware that there is support in the language of a recent decision of this court for the view that such a requirement is particularly unpleasant for the chief executive officer of a company, and should be reserved for extraordinary cases where no lesser remedy will achieve the remedial purpose. However, we uphold the Board's exercise of discretion in ordering this unusual remedy here because we find uniquely appropriate circumstances to warrant it.

The requirement that a particular management official read the Board's notice of their rights to employees, although rarely used,[97] has been subject to judicial scrutiny

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[96] The Board, then uncertain as to its authority to issue non-majority bargaining orders, did not issue one in *Teamsters Local 115*.

[97] The Board has imposed such a requirement in at least two cases in addition to those discussed *infra*. *See* United Supermarkets, Inc., 261 NLRB 1291 (1982); The Loray Corp., 184 NLRB 557, 558 (1970).

in this court before. In *Teamsters Local 115* v. *NLRB* (*Haddon House*), 640 F.2d 392 (D.C. Cir. 1981), this court refused to enforce the Board's requirement that the president of a company personally read the notice. The court reached that conclusion only after a painstaking review of the facts of the case, resting its reversal of the Board on "the lack of a particularized need" for such an *ad hominem* remedy. *Id.* at 403. Most important for our purposes, the court found that the record in *Haddon House* revealed little personal involvement by the president in the employer's numerous unfair labor practices. The ALJ in that case had not recommended such a remedy, and the Board itself had articulated no special reason for singling out the president as the indispensable purveyor of the Board's findings and orders. The Board's only rationale—that the president's personal reassurance to the employees would have greater impact—would presumably have justified the same remedy in every unfair labor practice case. The court concluded in these circumstances that the personal dignity interests of the president outweighed the marginal benefits of requiring his personal participation in the public reading. The court in *Haddon House* was careful to note the presence of different circumstances in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), *remanded on other grounds*, 633 F.2d 1054 (3d Cir. 1980), where the Board had also ordered the president personally to read the notice.[98] In that case the Board had emphasized the president's extensive personal participation in the violations sought to be remedied.

Thus, *Haddon House* in no way foreclosed the possibility that in another case egregious circumstances might justify the acknowledged personal indignity occasioned by

[98] The Third Circuit enforced the order without discussing the propriety of the public reading requirement. Because the employer had not challenged the remedy before the Board, the court did not permit an initial attack on review. 633 F.2d at 1064.

the Board's extraordinary order of a presidential reading. 640 F.2d at 403. Regrettably, the Board in this follow-up case again failed to address itself specifically to the special circumstances in the record that justified this remedy. But here, as distinguished from *Haddon House*, the ALJ who recommended the remedy, and whose findings and conclusions in this matter were adopted by the Board, made ample findings of fact to support the recommendation that the president personally be required to read the Board's notice to the employees.

The ALJ found that President Rizzuto *personally and repeatedly* communicated to employees the ominous threat to transfer operations to Hong Kong if the plant were unionized. 261 NLRB at 1267-68, 1271. The threat of a plant shutdown, itself held to be an unfair labor practice beyond the protection of the first amendment, *id.* at 1271, became the centerpiece of Conair's intense anti-union campaign. Subordinate officers, in repeating the threat to employees, stressed President Rizzuto's *personal animus* against unions as the basis for the threatened relocation. *Id.* at 1267, 1269. Rizzuto also *personally* threatened employees with the withdrawal of benefits such as Christmas parties and bonuses and the employees' profit-sharing plan if the Union won. Furthermore, Rizzuto *personally* promised his employees, in violation of section 8(a)(1), many improvements in working conditions and wages, including the "open door policy" by which grievances were solicited. *Id.* at 1264-65. Rizzuto, as well as other high company officials, issued this barrage of threats and promises at a series of unprecedented "captive audience" meetings, themselves held to violate section 8(a)(1). *Id.* at 1191 n.15.

Thus it is apparent from the ALJ's findings, adopted by the Board, that throughout the relentless anti-union crusade at Conair Rizzuto committed himself personally to defeating the union drive by unlawful means, under-

mining any possibility of reasoned discussion by systematically promoting fear and promising improvements. Nevertheless, the Employer now asserts Rizzuto's personal dignity as a basis for challenging the requirement that he read aloud to employees the Board notice that Conair will not engage in such practices in the future.[99]

The president of a company may indeed ordinarily be entitled to protest as oppressive a requirement that he read to the employees, even on a single occasion,[100] a statement of their rights and his company's obligations under the Act. The dignity interests implicated by such a requirement must always be carefully weighed and may be decisive when unfair labor practices, however egregious, are carried out entirely or primarily by subordinate management personnel. But it is the pervasive personal involvement of President Rizzuto in the unfair labor practices in this case that creates the need and justification for his personal involvement in their remedy. In order to dispel the atmosphere of intimidation created in large part by the president's own statements and actions, it is justifiable to require at least one formal declaration by him personally that the employees' statu-

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[99] The dissent reaches back to our decision in Int'l Union of Elec., Radio & Machine Workers v. NLRB, 383 F.2d 230, 234 (D.C. Cir. 1967), for language characterizing the requirement of a public reading as "incompatible with the democratic principles of the dignity of man." *See* Ginsburg dissent at 2. Our decision in the IUE case has clearly been superseded, if not actually overruled, by our more recent decision in *Haddon House*, which approved a public reading requirement though not its designation of the president as reader. *Haddon House* recast the issue in less loaded terms, invoking not absolute democratic principles of dignity but the "lack of a particularized need" for the requirement. *See supra* p. 60.

[100] The Board order permits Rizzuto to read the notice to the assembled employees either together or in smaller gatherings, as the Employer chooses. 261 NLRB at 1289.

tory rights will be respected in the future. The Board's order can thus reasonably be said to effectuate the purposes of the Act, and is not punitive, as argued by the Employer. While we emphasize that a remedy such as that ordered here should be reserved for extraordinary circumstances giving rise to a particular remedial need, it is important to recall that the notice to be read by the president is nothing more nor less than an official statement of the statutory rights and obligations found to have been violated by the Employer. Under the special circumstances of this case, we will enforce this aspect of the Board's order.[101]

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[101] We confess to being rather mystified as to the legal basis for the position taken by Judge Ginsburg in her dissent. The opinion does not rely, as *Haddon House* ultimately did, on the particular facts; it appears even to concede that if the remedy that Judge Ginsburg rests her argument heavily on the sug- is ever authorized it is appropriate here. Nor do we believe gestion, contrary to the Board's judgment, that a reading by the president might be less effective; such an intrusion into the expert judgment of the Board would certainly be unwarranted. Finally, the appeal to the principle barring a specific performance remedy for breach of personal service contracts is inapt. That principle operates in a factual and legal context too remote to serve as the basis for overturning the Board in an exercise of remedial discretion. Yet no other legal foundation for this position is evident. The opinion cites no statutory provision barring such a remedy. Although alluding to the supposedly "punitive quality" of the order, Ginsburg dissent at 2, the dissent does not actually appear to argue that the order is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943). While the elevated language of the dissent has a vaguely constitutional ring, it identifies no constitutional provision or principle offended by the Board's action. We believe that more than an affront to the sensibilities of individual judges is required to justify wholly eliminating this remedy from the Board's arsenal.

CONCLUSION

For the reasons stated (1) we decline to enforce the portion of the Board's "make whole" directives premised on Conair's alleged discharge of strikers on April 22, 1977; (2) we decline to enforce the Board's bargaining order; (3) in all other respects we deny Conair's petition for review and grant the Board's cross-petition for enforcement of its order.

It is so ordered.

WALD, *Circuit Judge*, dissenting:

I dissent. I believe that the Board had authority under the National Labor Relations Act to order bargaining with the Union based upon its findings, accepted by the majority of this panel, that no other remedy could "dissipate the lingering effects of [Conair's] massive and unrelenting coercive conduct" which "has foreclosed any possibility of holding a fair representation election," and that "a remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization." *Conair Corp.*, 261 NLRB 1189, 1193 (1982). In the face of such findings, my colleagues weakly profess frustration and vexation that "employers who offend the law most egregiously will escape the most stringent remedy in the NLRB's arsenal." Maj. Op. at 43. Yet they are forced to comb through the words of the statute and thousands of pages of its extensive legislative history for the few thin strands they weave into a statutorily-based rejection of the Board's authority to do anything about one of the worst cases of unfair labor practices it has encountered in its fifty year history. I find it paradoxical, yea incomprehensible, that they can accept the Board's findings of massive violations of the Act by the Employer, undermining embryonic labor support, and then infer from the "purpose" of the Act an intent of Congress to deprive the Board of the only remedy it believes can at some point in the near future restore the employees' right to make a free choice to have or not have a union. Either the Board is totally offbase in its findings, or my colleagues have usurped for themselves a mighty responsibility in emasculating the Board's remedial authority in extreme cases to fulfill its congressional mandate to "effectuate the policies of the Act."

I. The Board's Findings

The Board found not only that Conair had violated the Act, but that the violations had been so outrageous and pervasive that, in the Board's words,

> neither our traditional remedies nor even our extraordinary access and notice remedies can effectively dissipate the lingering effects of Respondent's massive and unrelenting coercive conduct. By this conduct, Respondent has foreclosed any possibility of holding a fair representation election. Under these exceptional circumstances, we find that a remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization.

261 NLRB at 1193. It was on the basis of these findings that the Board ordered the Employer to bargain with the Union, in spite of the Union's inability to demonstrate, through authorization cards or otherwise, that it had at any time obtained the support of a majority of the employees eligible to vote. The Board also found, however, that there was a reasonable basis to conclude that the *Union would have enjoyed majority support* but for the Employer's unfair labor practices, relying primarily upon the fact that the Union at one point had the support of forty-six percent of the employees. *Id.* at 1194.

Certainly conclusions as to the predicted effect of the Employer's illegal practices on the election process, the ineffectiveness of alternative remedies, and the probable effect of that illegal conduct on the Union's original ability to obtain majority support involve, even more than ordinary questions of fact, the utilization by the Board of its accumulated experience and expert judgment. The Supreme Court has underscored the necessity for judicial deference when reviewing such determinations. Commenting on the assertion by a circuit court that a cease and

desist order and the posting of notices ordinarily would effectively remedy unfair labor practices, the Court stated, "[i]t is for the Board and not the courts . . . to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Of course, the Board must always support its conclusions with a reasoned explanation and substantial evidence in the record. It did so here.[1]

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[1] The Employer objects that the Board failed to consider changed circumstances making the issuance of a bargaining order inappropriate after the passage of six years since the unfair labor practices took place. Although it did not offer evidence of any particular changed circumstances, it argues that the Board has a duty to inquire as to whether, for example, there have been changes in the composition of the workforce or other outside forces that would tend to dissipate the lingering taint of the earlier events. Brief for Appellant [hereinafter Employer's Brief] at 43-44. The majority implicitly rejects this objection, thus reaching the issue of statutory authority; I agree that the objection fails, and I summarize my own reasoning for whatever guidance it may offer.

Neither the mere passage of time, NLRB v. Katz, 369 U.S. 736, 748 n.16 (1962), nor normal employee turnover, Franks Bros. Co. v. NLRB, 321 U.S. 702, 703-06 (1944); NLRB v. Ship Shape Maintenance Co., Inc., 474 F.2d 434, 443 (D.C. Cir. 1972), is grounds for overturning a bargaining order. However, the significance of subsequent events for the validity of a Board order is a subject of sharp dispute among the circuits and the Board. *Compare* NLRB v. Drives, Inc., 440 F.2d 354, 366-67 (7th Cir.), *cert. denied sub nom.* General Drivers & Dairy Employees v. NLRB, 404 U.S. 912 (1971); G.P.D., Inc. v. NLRB, 430 F.2d 963, 964-65 (6th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); NLRB v. Staub Cleaners, Inc., 418 F.2d 1086, 1089-90 (2d Cir. 1969), *cert. denied*, 397 U.S. 1038 (1970) (upholding Board's refusal to consider subsequent events) *with* Peoples Gas System, Inc. v. NLRB, 629 F.2d 35 (D.C. Cir. 1980); NLRB v. Western Drug, 600 F.2d 1324 (9th Cir. 1979) (requiring Board to consider certain events). This court has required the Board to consider subsequent events

In evaluating the impact of the unfair labor practices in *Conair*, the Board followed its analysis in *United Dairy*

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only when particularly noteworthy events such as an unusually high rate of turnover, NLRB v. Ship Shape Maintenance Co., Inc., 474 F.2d at 443, or the union's decisive loss in a valid election wholly free of employer coercion, Peoples Gas System, Inc. v. NLRB, 629 F.2d at 47-48, have been brought to the attention of the Board or the court. I am aware of no such event in this case. Furthermore, in neither of these two previous cases had the employer been found guilty of substantial, much less "outrageous and pervasive," unfair labor practices. *See* 474 F.2d at 442 ("[n]o overt anti-union animus . . . was demonstrated to any of its employees."); 629 F.2d at 39 (court emphasized "borderline nature of the violation" of duty to bargain). *See also* NLRB v. Wilhow Corp., 666 F.2d 1294, 1304 (10th Cir. 1981); NLRB v. Western Drug, 600 F.2d at 1326 (turnover need be considered only in close cases, not egregious cases). As the Fifth Circuit stated about practices similar to the Employer's here:

> Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed. The Board is not compelled to infer that past practices have attenuated, especially practices striking directly at the heart of the security of the employees, such as threats to close the plant, blacklisting, and the like.

Bandag, Inc. v. NLRB, 583 F.2d 765, 772 (5th Cir. 1978).

Additional considerations militate against imposing a blanket requirement that the Board inquire into possible subsequent events before issuing a bargaining order. First, it would generate enormous administrative difficulties at the Board level and possibly delay resolution of basic issues in the case including Employer liability as well as remedial measures. Second, we would reward the Employer's efforts to postpone the enforcement of an effective remedy by attaching to every normal delay in the process a "bonus" in the form of a requirement of further proceedings entailing additional delay. The Ninth Circuit, confronted with a similar issue, went to the jugular:

> [Delay] is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration on the basis of facts occurring after

Farmers Cooperative Association, 257 NLRB 772, 774 (1981) (*United Dairy II*), which identified the "gravity, extent, timing, and constant repetition" of violations as the key factors bearing upon whether the employer's illegal conduct was so outrageous and pervasive as to foreclose the possibility of a fair election. 261 NLRB at 1192. Summarizing its findings as follows, the Board laid heavy stress on the repetition and insidious timing of the violations committed by this Employer:

> The chilling effect on employee rights of a single discharge or threat of plant closure is difficult enough to erase. Several repetitions of these and other violations of the Act multiply the strength and duration of the impression left on employees. The same multiplier effect results from the manner in which Respondent timed its unlawful conduct—i.e., swift and severe initial retaliation against the Union's organizational efforts, a lengthy campaign of unfair labor practices, an increase in violations as the election neared, and two unlawful discharges even after the election. In moment and duration, the timing of Respondent's unfair labor practices under-

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> the Board's decision, is to put a premium upon continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate. Suppose that the Board does so, and again finds against the employer. There can then be a petition to this court, a decision by it, and a petition for certiorari to the Supreme Court. By that time there will almost surely be another new set of facts. When is the process to stop?

NLRB v. L.B. Foster Co., 418 F.2d 1, 4 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

On occasion, especially significant subsequent events may critically undermine the Board's ability to draw educated inferences about future events from circumstances at the time of the violations, even in the case of extremely serious violations. This possibility, however, does not compel us to require the Board in this case to inquire into possible subsequent events.

> scored its enduring resolve to oppose unionization by any means and deeply imprinted on employee memories the drastic consequences of seeking union representation.

Id. at 1193. I agree wholeheartedly with the majority that "we have no cause in this case to second guess the NLRB's expert appraisal of the quality and effects of Conair's unlawful activities."[2] We have today unanimously upheld the Board's judgment that the Employer's coercive conduct has left such an indelible mark on the workforce that not even the Board's extraordinary notice and access remedies would restore to employees their right to make an uncoerced decision about union representation.

The Board also found that it was reasonable to conclude that the Union would have enjoyed majority support but for the Employer's egregious conduct. The Board's finding on this issue, which I consider critical,[3] rests on precisely the same kind of expertise and the same body of precedent, and is thus entitled to the same degree of deference as its other conclusions concerning the seriousness and probable impact of particular unfair labor practices. Yet the majority swiftly passes over the Board's

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[2] Maj. Op. at 36. The majority continues:

> First, this case in several respects is similar to the one other case in which the Board concluded a nonmajority bargaining order was necessary because an employer's 'outrageous' and 'pervasive' unfair labor practices precluded a fair rerun election, and it is distinguishable from cases in which the Board did not reach that conclusion.

Id. at 36-37 (citations omitted).

[3] *See infra* at 26. The Board disclaims reliance on this conclusion as a necessary prerequisite to a bargaining order. Conair Corp., 261 NLRB at 1194. Because this conclusion is a significant aspect of the factual context for the Board's claim of statutory authority, however, I discuss its validity here.

conclusion as to the probable effect of the coercive practices on the Union's initial ability to gain majority support, asserting that "[a]bsent a card majority, the Board cannot forecast with any degree of reliability how the employees would have responded in a free election." Maj. Op. at 43-44. This cavalier rejection of the Board's expert judgment is inconsistent with the posture of deference properly assumed with respect to the Board's closely related conclusions unanimously upheld here. Furthermore, the main study cited in support of the majority's statement actually confirms the Board's premise that serious unfair labor practices by employers have a significant effect on the level of support for the union.[4] Finally, in this case the majority agrees with the Board that the campaign of coercion was exceptionally intense and pervasive. It is in light of that assessment that I briefly review the factual basis for the Board's conclusion. The Union began its organizing campaign in March and by April 11 had the support of about forty-six percent of the employees. 261 NLRB at 1205. Yet only days after the onset of the Employer's campaign on April 4, a group of twenty-five to thirty employees approached the Union, stating that the Employer's threats had made them fear losing their jobs;

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[4] The majority cites Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1796, 1786 (1983) (discussing W. Dickens, Union Representation Elections: Campaign and Vote (Oct. 1980) (unpublished Ph.D. dissertation, Department of Economics, Massachusetts Institute of Technology)) for the conclusion that unions would have won just under half of all elections if employers had campaigned entirely cleanly. *See* Maj. Op. at n.79. The same study concluded, however, that the number of pro-union votes was reduced by 15% where employer unfair labor practices included threats or actions against union supporters. Weiler, *supra*, at 1781-86. In particular, the study results indicate that employer intimidation is most effective when the union does not enjoy overwhelming support. *Id.* at 1785.

several requested the return of their cards. *Id.* at 1191. The Union secured only fourteen authorization cards after April 11, the day the strike began. *Id.* at 1205 n.15. If the Employer's conduct had such an immediate impact on employees who had already expressed their support for the Union, it was certainly reasonable for the Board to conclude that it may have had an equally inhibiting impact on the relatively small number of undecided employees—about fifteen—that would have sent the union over the fifty percent mark and into majority status for recognition purposes. There is little question but that the Union would have continued to gain adherents but for the Employer's relentless anti-union campaign. The Board's conclusion in this respect is thus supported by adequate reasoning, established Board precedent concerning the impact of various unfair labor practices, and substantial evidence in the record.

II. The Board's Authority to Issue a Non-Majority Bargaining Order

The Board rested its claim of statutory authority in large part on the Supreme Court's opinion in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and on subsequent judicial interpretations of that decision. I, too, find support for the Board's authority in the language and reasoning of these cases, recognizing that, as always with Supreme Court dictum and even with Supreme Court holdings, what the Court giveth it can as easily taketh away. In any event, because the issue of non-majority bargaining orders has been smoldering on the Board and in this court for decades, I believe a searching inquiry into the language, legislative history, and underlying policies of the Act, as well as the practical effects on labor relations of upholding or overturning the Board, is called for before pronouncing judgment on either side of the issue. I find in none of these sources,

singly or cumulatively, any contrary indicators to what the Supreme Court appeared to be saying in *Gissel*. On the contrary, I conclude from my inquiry that the issuance of a non-majority bargaining order under exceptional circumstances like these may well be the only way to "effectuate the policies of the Act."

A. *The* Gissel *Decision and Category I Cases*

In *Gissel*, the Court decided that a majority of union authorization cards, unambiguous on their face, constituted "convincing evidence of majority support." If an employer refused to bargain with a union that had obtained a majority of valid cards, and at the same time committed independent unfair labor practices tending to undermine the union's majority strength and impede the election process, the Board could issue a bargaining order as a remedy even if the union subsequently lost the election.

The Court went on to summarize in some detail the factors that determine the appropriateness of a bargaining order in three categories of cases:

> Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, *without need of inquiry into majority status on the basis of cards or otherwise*, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." The Board itself, we should add, has

> long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.
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> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a *lesser showing of employer misconduct* is appropriate, we should reemphasize, *where there is also a showing that at one point the union had a majority*; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.

395 U.S. at 613-14 (citations omitted) (emphasis added). The Court thus reinforced its approval of the "Category I" non-majority bargaining order described by the Fourth Circuit by indicating that a showing of majority support is necessary only in "less extraordinary cases" falling into Category II. The Court also described a third category of even less serious offenses in which no bargaining order was appropriate without an election. *Id.* at 615.

The Court's description of Category I cases of outrageous and pervasive violations where a bargaining order is warranted "without need of inquiry into majority status" is characterized by the majority as mere dictum, a palliative to the rejected and presumably dejected Fourth Circuit.[5] I am not as certain as the majority that the "dictum" can be so easily dismissed. In one of the four cases decided by the Court in *Gissel*, the Court

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[5] *See* Maj. Op. at 46-47; *see also* Teamsters Local 115 v. NLRB, 640 F.2d 392, 396 (D.C. Cir. 1981) (*Haddon House*); Employer's Brief at 36. *Cf.* United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1065-66 (3d Cir. 1980).

appears to have applied the analysis it described as appropriate for Category I cases:

> In *Sinclair*, No. 585, the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats. The Board therefore did not have to make the determination called for in the intermediate situation above that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards.

Id. (footnote omitted). As the majority suggests, the court's statement is cryptic, and is conceivably open to an interpretation that its reference to the "absence of a § 8(a)(5) violation" alludes only to the employer's possible lack of bad faith in refusing to bargain. *See* Maj. Op. at n.85. But the language is also open to a reading that the Court did not feel it necessary to inquire into the majority status of the union in disposing of the *Sinclair* case. Because the extreme nature of the employer's coercive conduct made a fair election impossible and therefore placed *Sinclair* into Category I, the Board did not have to meet the Category II requirements of showing that the union had obtained a card majority and that a fair election was too unlikely to disregard this showing of majority support. This court has previously adopted the latter interpretation, declaring that the Supreme Court in *Gissel* "approved the bargaining order entered against Sinclair without a showing of a prior union majority because the facts indicated 'exceptional' or 'outrageous' unfair labor practices." *Amalgamated Clothing Workers* v. *NLRB*, 527 F.2d 803, 808 (D.C. Cir. 1975), *cert. denied sub nom. Jimmy Richard Co.* v. *NLRB*, 426 U.S. 907 (1976).

Virtually every other court I know of has interpreted the *Gissel* decision similarly, assuming the existence of

an extreme category of cases in which a bargaining order may issue in the absence of a card majority.[6] Only recently, however, did the case materialize.[7] In *United Dairy Farmers Cooperative Association* v. *NLRB*, 633 F.2d 1054 (3d Cir. 1980), the Third Circuit faced the issue for the first time in a union appeal from the refusal by a divided Board to issue a bargaining order in a *Gissel* Category I situation.[8] After a careful analysis of

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[6] *See, e.g.*, NLRB v. Montgomery Ward Co., 554 F.2d 996, 1002 (10th Cir. 1977); NLRB v. Armcor Indus., Inc., 535 F.2d 239, 244 (3d Cir. 1976); J.P. Stevens Co., Gulistan Div. v. NLRB, 441 F.2d 514, 519 (5th Cir.), *cert. den.*, 404 U.S. 830 (1971); NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967). *But cf.* NLRB v. Roney Plaza Apartments, 597 F.2d 1046, 1051 n.8 (5th Cir. 1979).

[7] Prior to 1979, the Board had uniformly declined to issue bargaining orders, even in cases of "outrageous" and "pervasive" violations, in the absence of a showing of majority status. *E.g.*, Fuqua Homes Missouri, Inc., 201 NLRB 130 (1973); GTE Automatic Elec., Inc., 196 NLRB 902 (1972); The Loray Corp., 184 NLRB 557 (1970). It is not clear from these cases, however, that the Board believed itself to be without authority ever to order this remedy. In none of the three cases above had the precise extent of employee support for the union been litigated at all; nor had the General Counsel sought a bargaining order. Furthermore, the Board found, explicitly in The Loray Corp., 184 NLRB at 558, and implicitly in the other two cases, that other non-bargaining remedies would be adequate to redress the employers' violations. As I read these cases, the Board's determination that a bargaining order was not appropriate was not so much based on its view of the limits of its statutory authority as on its expert assessment of the particular remedial requirements presented by a given set of facts.

[8] 633 F.2d at 1064-65. Two members of the Board believed that, although the Board may have such authority under some circumstances, this was not the appropriate case for the exercise of that authority. United Dairy Farmers Coop. Ass'n, 242 NLRB 1026, 1028 n.11 (3d Cir. 1979) (*United Dairy I*). Two members argued that the Board did have the authority and should exercise it in this case. *Id.* at 1031-38.

the *Gissel* decision and its rationale, the court held that "the Board has the remedial authority to issue a bargaining order in the absence of a card majority and election victory if the employer has committed such 'outrageous' and 'pervasive' unfair labor practices that there is no reasonable possibility that a free and uncoerced election could be held." *Id.* at 1069.

Nonetheless, despite the *Gissel* pronouncement and a contemporary consensus of circuit court interpretations of it to the effect that the Board may issue a non-majority bargaining order to counter extraordinarily flagrant employer violations, our court decides today that the Board has no statutory authority ever to issue such an order. *See also Teamsters Local 115* v. *NLRB* (*Haddon House*), 640 F.2d 392 (D.C. Cir. 1981) (earlier misgivings about such authority).[9] With the understandable queasiness experience brings from relying too heavily on predictions of what the Supreme Court will do in the future based on what it has said in the past, I turn now to an examination of the language and legislative history of the Act to see whether the Board's interpretation of *Gissel* will hold.

B. *The Language of the Act*

The Board points to the broad remedial mandate of section 10(c), empowering it to order a party "to take such affirmative action . . . as will effectuate the policies

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[9] In *Haddon House*, this court upheld the Board's refusal to issue a non-majority bargaining order without discussing the Board's statutory authority to do so. Faced with the same Board member lineup as the Third Circuit in *United Dairy*, *see supra* note 8, this court was not persuaded that the Board's decision rested on the legal conclusion of one member that the Board lacked authority. We found that the Board decision just as likely turned on the judgment of two members that the exercise of that authority was inappropriate in that case, and we therefore did not reach the question of statutory authority. 640 F.2d at 397 n.7.

of [the Act]" once it has found a violation. The Employer asserts and the majority now decides that the Board's seemingly wide authority under section 10(c) is in fact securely bound by a fundamental principle of majority rule incorporated in section 9(a) which acts as an absolute limitation on the Board's authority to issue a non-majority bargaining order, whatever the circumstances.

Section 9(a) states in relevant part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ." 29 U.S.C. § 159(a). The Employer and the panel majority read the exclusive majority representation rule of section 9(a) into section 7, which provides that "[e]mployees shall have the right to self-organization, . . . to bargain collectively through representatives of their own choosing, . . . and shall also have the right to refrain from any or all such activities." 29 U.S.C. § 157. They say that together the two sections mean that the employees' right to bargain through representatives chosen by majority rule is violated by any Board order that requires an employer to bargain with a union that cannot demonstrate that it has at any time enjoyed the support of a majority of the employees, regardless of the egregiousness of the employer's conduct. In addition, the Employer points to section 8(a)(2), which makes it an unfair labor practice for an employer "to dominate or interfere with the formation . . . of any labor organization," 29 U.S.C. § 158(a)(2), and which has been interpreted to prohibit an employer from voluntarily recognizing a union that repsents only a minority of its employees. *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961).

Sections 9(a) and 8(a)(2) define conduct constituting unfair labor practices on the part of employers. They appear to have no direct application to the scope of the

Board's remedial authority when employers have been found guilty of unfair labor practices. Congress most assuredly knew how to limit the Board's authority. For example, section 9(b), following directly after section 9(a) and dealing with determination of bargaining units, clearly limits the Board's power. It provides "that the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b). It seems obvious to me that neither section 9(a) nor any other section of the Act dealing with unfair labor practices by an *employer* can be automatically read as an explicit limitation on the authority of the *Board* to take remedial action as to those same unfair labor practices.[10]

The majority's argument that section 9(a)'s majority principle, in conjunction with section 7's guarantee of

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[10] The Supreme Court has on occasion limited exercise of the Board's remedial authority because of conflict with a basic policy embedded in the Act. In H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), the Court held that the Board lacked authority to order an employer to accept a particular union bargaining proposal, citing section 8(d) of the Act: "[The obligation to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U.S.C. § 158(d). The Court reached its conclusion that the Board lacked authority in that case not from section 8(d)'s language alone, however, but rather from overwhelming evidence in the legislative history that Congress explicitly intended to preclude the Board from intruding into the substantive terms of collective bargaining agreements. *See* 397 U.S. at 104-06. In my view, the "plain language" of sections 7 and 9(a) offers far less support for the Employer's (and the panel's) view that the Board is barred from ever issuing a non-majority bargaining order, even when the employer has made a fair election impossible, than did the explicitly preclusive language of section 8(d), cited in *Porter*, defining exactly what the obligation to bargain did or did not mean.

freedom of choice, limits the Board's remedial authority in all cases and for all time ignores the quintessential paradox of this case. The Employer has been found to have engaged in an intense campaign of egregious unfair labor practices in complete and deliberate disregard of the section 7 right of employees freely to choose their bargaining representatives. Now the Employer—and the panel majority—emerge as the champions of that very right of choice: they would invoke that right as an absolute bar against the Board's authority to remedy the Employer's violation by issuing a bargaining order. But in fact, by my colleagues' own admission they simply leave the employees in an eternal limbo, for the Board has determined that a bargaining order in the short run is the only means of restoring to the employees their statutory right freely to choose whether or not to be represented in the long run by a union. Thus both the Board and the panel/Employer assert the same statutory sections as the basis for their diametrically opposite positions on the permissibility of a non-majority bargaining order. I am particularly reluctant to reject the Board's construction of its remedial authority on the basis of a purported conflict with the very statutory language it is claiming to implement. The bottom line here is how the employees, having been subjected to relentless employer pressures not to choose a union, can be best restored to some kind of equilibrium in which they can choose freely for or against the Union. The Board, as the expert in the field, says this can happen only if a short-term bargaining order is put into effect; the panel says that such an order is against statutory policy and that the employees therefore should be left in the *status quo*. Certainly the language of the statute alone does not compel Board paralysis of this sort.

C. *Legislative History*

There is nothing in the legislative history of the Wagner Act or subsequent amendments to indicate that Con-

gress meant to withhold this remedial power from the Board. The majority's citations prove only that Congress provided a mechanism for employees in the usual situation to pick or reject their union by majority rule and required employers to abide by that decision. There is not a single word, however, to suggest that, if a fair election could not be held because of employer interference, the Board's remedial powers were absolutely restricted by majority rule.

Of course, Congress in passing the Wagner Act embraced the principle of majority rule in the selection of bargaining representatives by employees. S. Rep. No. 573, 74th Cong., 1st Sess. 13-14 (1935); H.R. Rep. No. 972, 74th Cong., 1st Sess. 18-19 (1935). It did so to obviate refusals by employers to recognize a labor organization that represented the majority of employees, and their attempts instead to divide employees by bargaining with individuals or with a company union that represented only a minority. Congress thus associated minority bargaining by the employer with collusive and complacent company unions; it was also worried about destructive competition among unions caused by employer bargaining separately with factions or individuals. *See* H.R. Rep. No. 972 at 19. These dangers arise where an organized majority is denied recognition; they have nothing to do with a situation like this where the Board orders the employer to bargain with the only employee organization that reasonably could be expected to have gained majority support but for the outrageous and pervasive unfair labor practices of the employer.

Throughout the Act's passage, the principle of majority rule was always discussed in the context of an employer's bargaining obligations or the employees' representation choices; it was never discussed as a limitation on the Board's powers. Indeed, the Act's major sponsor, Senator Wagner, explicitly approved the possibility of a remedial bargaining order in the absence of a current majority when he approved the result in *Texas & New*

Orleans Railroad Co. v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930). *See Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 21-22 (1935) (statement of Sen. Wagner). In that case, decided under the Railway Labor Act, the Supreme Court upheld the order of the district court "disestablishing" a company union which could show current majority support, and reinstating the union that had enjoyed majority support before the company's illegal and coercive campaign against it. The company was ordered to recognize the union that currently had only minority support until the employees rejected it in a fair and uncoerced election. 281 U.S. at 557, 571. In addressing that case, Senator Wagner implicitly acknowledged that strict application of the principle of majority rule must sometimes give way to the need to remedy illegal employer practices in order to permit employees genuine freedom of choice.

In general, however, non-majority bargaining orders as remedial measures were not discussed. *See* H.R. Rep. No. 972 at 21 (examples of remedial measures within Board's power). I infer from this silence at most either that Congress never conceived of the extraordinary circumstances giving rise to the need for a non-majority bargaining order or that Congress did not wish to constrain the Board's choice of remedial measures in this manner. I certainly see no way to infer, as the majority does, that the Act meant to take away from the Board this specific remedy without ever identifying it. The legislative history of the Wagner Act accordingly gives no cause to overrule the Board in its choice of remedies.

Nor does the history of subsequent amendments to the Wagner Act. The Taft-Hartley amendments in 1947 were addressed in part to perceived excesses by the Board. For instance, they limited the Board's power to certify bargaining representatives by means other than secret ballot election, 29 U.S.C. § 159(c);[11] they pro-

[11] Section 9(c) of the Wagner Act had permitted the Board to certify a representative by "a secret ballot of employees,

vided for a process by which employees could decertify a bargaining representative they no longer supported, 29 U.S.C. § 159(c)(1)(A)(ii); § 159(e)(1); they prohibited certain kinds of "closed shop" agreements which limited employment to union members, 29 U.S.C. § 158(a)(3). The Supreme Court in *Gissel*, however, demonstrated the irrelevance of any of these changes to the Board's independent power to issue a remedial bargaining order, noting the critical distinction that "[a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 598-99 (1969).[12] Congress did not deal either in 1947 or in later amendments with the kind of remedial order issued by the Board here, which neither certifies a union nor compels union membership.

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or . . . any other suitable method to ascertain such representatives." National Labor Relations Act, ch. 372, § 9(c), 49 Stat. 453 (1935). The Taft-Hartley amendments in 1947 substituted a more elaborate set of guidelines effectively limiting certification to unions that had gained a majority in a valid secret ballot election. Labor Management Relations Act, ch. 120, Title I, § 101, 61 Stat. 143 (1947) (codified at 29 U.S.C. § 159(c)).

[12] For example, for a one-year period following certification, there is an irrebuttable presumption of majority status during which the employer must bargain with the union, Brooks v. NLRB, 348 U.S. 96, 103 (1954), and during which no rival union may petition for an election, 29 U.S.C. §§ 159(c)(3); 159(e)(2), or picket for recognition, 29 U.S.C. § 8(b)(4)(c). After the one-year "certification bar" the union has the benefit of a continuing but rebuttable presumption of majority status. Brooks v. NLRB, 348 U.S. at 103-04. In addition, the so-called "contract bar" calls for the automatic dismissal of any representation petition by a rival union during the term, up to three years, of a valid collective bargaining agreement between an employer and the certified representative of the employees. *See, e.g.*, Leonard Wholesale Meats, Inc., 136 NLRB 1000 (1962). A union that has obtained bargaining rights under a remedial bargaining order does not necessarily acquire these benefits.

The majority argues that Congress' addition in 1959 of section 8(f), authorizing pre-hire agreements with unions in the construction industry even in the absence of a prior showing of majority support, reinforces the conclusion that there is no other authorized exception to the principle of majority rule. I disagree. If Congress had not passed section 8(f), employers in the construction industry, like other employers, would be barred by section 8(a)(2) from voluntarily concluding agreements with a union that cannot demonstrate majority support. Congress recognized the special needs of the construction industry and permitted such voluntary agreements. Thus, section 8(f) is an exception to a general rule that the Board's remedial order here does not contravene. In other words, the majority's view of the significance of section 8(f) is merely a recapitulation of the Employer's argument that the Act's prohibition on voluntary minority bargaining precludes a remedial non-majority bargaining order. I do not believe that this prohibition has any bearing upon the power of the Board to order bargaining where the employer has by extremely coercive conduct prevented the union from gaining a majority. *See infra* at 21.

In sum, neither language nor legislative history contains anything to show that Congress intended to prohibit the Board from issuing a non-majority bargaining order if it is truly necessary to "effectuate the purposes of the Act." The centrality of the majority rule principle in the Act only reinforces the paradox that results from the majority's ruling today: the Board is precluded by the principle of majority rule from issuing a non-majority bargaining order when the Board has found (and the panel majority has conceded) that such an order is the only effective way of restoring to employees their right to make an uncoerced majority decision about union representation. I find such statutory creativity disturbing, to say the least.

D. *The Policy of the Act: Majority Rule and Employee Freedom of Choice*

The majority's argument—like the Employer's—appears to boil down to one of statutory ambience: Even if there is no explicit prohibition of a non-majority bargaining order in the language or legislative history of the Act, the entire statutory scheme of collective bargaining rests on the premise of majority rule and its corollary, the prohibition against minority bargaining set out in *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731, 738 (1961). Assuming that this is true, however, there is a familiar principle that the need to remedy a violation often justifies and even requires measures that might be unauthorized if undertaken on the actor's own volition. For example, state-imposed racial quotas, in the absence of an arguable constitutional violation, may run afoul of the fourteenth amendment under *Bakke*.[13] But courts clearly have the power to order race-conscious remedies for proven constitutional violations.[14] This principle also operates throughout the administration of the Act in contexts no longer in dispute. Thus, an employer would presumably violate the Act's prohibition on minority bargaining if he voluntarily recognized and bargained with a union that, although it once had a card majority, had since lost a Board election. Yet *Gissel* clearly authorizes the Board to order bargaining under such circumstances if the employer has committed substantial independent unfair labor practices. The prohibition on minority bargaining thus has no application to the permissibility of a bargaining order.

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[13] University of California Regents v. Bakke, 438 U.S. 265 (1978).

[14] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *Cf.* Fullilove v. Klutznick, 448 U.S. 488 (1980) (10% minority set-aside is within Congress' power to enforce 14th amendment, in view of past discrimination).

The principle of majority rule, while indeed central to the scheme of employer-employee rights and obligations, has never been mechanically applied to bind the Board in the remedial area. The *Gissel* situation is only one of several recognized by the Supreme Court in which the Board, pursuant to and consistent with the policies of the Act, may require an employer to bargain with a union that cannot demonstrate current majority status,[15] or to cease bargaining with a union that does appear to have the support of a majority.[16] Furthermore, the Board is clearly authorized to invalidate for cause the results of elections in which a majority of employees expressed their preference either for[17] or against[18] a union.

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[15] The Board may order an employer to bargain with a union that had a card majority before the employer succeeded in obtaining evidence of majority support for an employer-dominated union, International Ass'n of Machinists v. NLRB, 311 U.S. 72 (1940); and with a union that had a card majority but withdrew its election petition because of the employer's unfair labor practices. Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944). Furthermore, an employer may not refuse to bargain with a union within one year of its certification or during the term, up to three years, of a valid collective bargaining agreement whether or not the union can still demonstrate current majority support. Brooks v. NLRB, 348 U.S. 96 (1954).

[16] The Board may order an employer to cease recognizing an unlawfully dominated union even though it may have majority support. NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1937).

[17] *See, e.g.*, NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973) (Board should set aside election where union waived initiation fees for employees who signed cards before election). Courts have shown no reluctance to direct that a union victory be set aside in cases of union misrepresentations. *See generally* General Knit of California, Inc., 239 NLRB 619, 626 (1978) (Member Penello, dissenting) (citing 47 cases in which courts denied enforcement of Board orders based on elections with minor union misrepresentations).

[18] *See, e.g.*, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (upholding Board invalidation of union electoral loss

In truth, the majority rule principle is inextricably tied in the statutory scenario to the unfair labor practice prohibitions against employer coercion, domination and discrimination contained in sections 8(a)(1), (2) and (3) of the Act. These limitations on employer conduct during organizational campaigns are more severe than we would tolerate in the political process, but they are acceptable in the labor context precisely because of the inherent potential for economic coercion of employees by the employer. As the Supreme Court stated in *Gissel*,

> what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk.

395 U.S. at 617-18. The entire statutory scheme is based on the clear congressional endorsement of the notion that only in the absence of illegal employer coercion can a majority of employees make the kind of free choice for or against union representation that is at the heart of the majority rule principle incorporated in the Act.

Thus it is heavy irony that this majority rule principle should now be touted to prevent the Board from dealing with the most intimidating tactics adopted by employers to discourage union representation. We have here a case in which the Employer has been found guilty by the Board and this court of such outrageous and pervasive violations of the Act as to destroy any electoral atmosphere in which employees may express free choice. Under these circumstances, the vigorous assertion by the Employer and the majority of the statutory rights of the employees to select or not to select a bargaining repre-

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where employer granted unlawful economic benefits during campaign).

sentative strikes me as either disingenuous or incredibly naive.

I would emphasize here what a remedial bargaining order does and does not do and the Board's reasoning as to how such an order can help restore to employees their right to make an uncoerced decision about union representation and collective bargaining. First, a bargaining order is not tantamount to certification, which, as we have noted, affords the union certain statutory privileges and a continuing presumption of majority status.[19] As the Supreme Court has recognized, "[t]here is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." *NLRB* v. *Gissel Packing Co.*, 395 U.S. at 613. The bargaining order does not impose union membership.[20] Furthermore, the union's ability to impose contractual terms against the will of a majority of the employees is virtually nonexistent:

> The employees need not strike against their will. And they will generally possess some influence over the terms of the bargain, if only because the contract will often depend, in the last analysis, on their willingness to fight to obtain it. Still more important, there is every reason for the union to negotiate a

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[19] *See supra* note 12.

[20] As one commentator has noted,

> "bargaining will not necessarily compel the employees to join the union or pay dues. These consequences will follow only if a union security clause is negotiated. An employer who will violate the law to resist unionization is an unlikely prospect for a union security clause, and it will be difficult to pressure him into making this concession when the majority of the employees are opposed.

Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 135 (1964).

> contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.[21]

At the same time, a bargaining order does impose a trial period during which the employees can gain exposure to the merits of union representation in the only way that remains possible when the employer has irremediably destroyed all opportunity for a free election preceded by open discussion and debate. When the employer has so flagrantly flouted the law and the rights of its employees in order to keep out the union, thereby impressing upon employees his complete and unchallengable control over their working conditions, a bargaining order may provide the only opportunity, albeit a temporary one, for them to see at work an employee organization with which their employer is obligated to negotiate about specific proposals to better their working conditions. This interim arrangement may also serve to dissuade them of lingering fear that it is impossible to elect a union without suffering dire consequences. In grossly tainted atmospheres, only the dynamics of ongoing collective bargaining and the display of power by a functioning employee organization can dispel the overwhelming sense of impotence created by the employer's prior success in breaking up the employees' attempts at self-organization.[22]

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[21] *Id.*

[22] This case thus presents a far different situation than we faced in Local 57, Int'l Ladies' Garment Workers' Union v. NLRB, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967), in which the employer had violated sections 8(a)(1), (3), and (5) when it moved its operations to Florida from a unionized shop in New York. As part of its remedy, the Board ordered the employer to bargain with the union at the Florida location. We denied enforcement because the remedy violated the Florida employees' freedom to select a

I do not view this case, as the majority does, as presenting a conflict between employee freedom of choice and majority rule on the one hand, and the Board's determination to punish the Employer or simply deter future violations on the other. As the Board explained in its decision, the Employer has already effectively undermined any opportunity to ascertain whether an uncoerced majority would choose to be represented by this union, *Conair Corp.*, 261 NLRB at 1194, although "a reasonable basis exists for concluding that the Union would have enjoyed majority support but for Respondent's unfair labor practices." *Id.* As noted previously, the union held authorization cards from forty-six percent of the employees before the Employer's vicious campaign began to take its toll. *Id.* I would be less confident about the propriety of a bargaining order in a case in which it was not reasonably likely that the union would have gained majority support in a free atmosphere. In this case, however, the failure of the union by less than five percent to make it over the fifty percent mark at any point in its campaign demonstrates to me the imprudence of drawing this "clear bright line" where an agency's statutory authority to choose remedial measures for extreme violations is at issue.

To invoke the principle of majority rule as an absolute bar to a bargaining order in cases of extreme coercion

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bargaining representative. *Id.* at 300. The Board had justified its remedy solely on the basis of the need "to deprive the company of the 'fruits' of its illegal acts," *id.*, and to deter others, *id.* at 303. In that case, unlike this one, there had been no showing of any interest by the Florida employees in the union and no claim that they had been coerced so as to make a fair election impossible. Furthermore, the Board did not even assert that the remedy would restore to the New York employees the section 7 rights violated by the employer. In short, the Board had wholly ignored the rights of one group of employees, not even to restore the rights of another group of employees, but simply to punish the employer and deter others. This case is obviously radically different.

like this introduces into the Act an unjustified premise that the employees' right to reject collective bargaining is more important than their right to choose it,[23] a premise Congress clearly did not endorse. To leave untouched, perhaps permanently, the negative fallout of an employer's successful campaign to wipe out organizational activity means that the employees are indefinitely presumed to have rejected the union even when they have been prevented from exercising their free choice. To permit a Board order as temporary surrogate for their right to select a union representative, on the other hand, appears a far less drastic alternative, and more in keeping with the congressional policy of encouraging free choice and collective bargaining.[24] I believe that the fundamental statutory policy of protecting employees' freedom to choose by majority rule whether to be represented by a union is not undermined but rather is advanced by a temporary non-majority bargaining order where it is reasonable to conclude that the union would have gained majority support but for the employer's outrageous and pervasive unfair labor practices, and where

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[23] The Chamber of Commerce in its amicus brief openly urges this premise upon us. It argues that "(A) unionization imposes major burdens on personal liberty that most Americans refuse to accept, and (B) the Act contemplates that those burdens will be imposed only in response to the active, demonstrated, majority will of the employee unit." Brief of amicus curiae Chamber of Commerce at 8.

[24] The majority complains that I "would substitute for the coercion Conair imposed an opposing coercive force imposed by the government." Maj. Op. at 56. I view the choice differently. Faced with massive and documented coercion by Conair that the majority agrees made a free election impossible, the Board applied the only remedy it found effective, even though there was a theoretical possibility (almost purely hypothetical in this case) that undesired union representation might be temporarily imposed on employees. So viewed, the Board's and my choice seems not only justifiable but necessary under the Act.

no other remedial measures available will remove the taint of those practices so as to permit a fair election in the foreseeable future. I simply do not understand the logic of the majority's walk-away construction when confronted with violations of these dimensions and impact.

E. *The Policy of the Act: Deterrence*

In the face of coercive conduct as grave, deliberate, and unrelenting as the Employer's conduct here, the Supreme Court has also said that the Board may properly give increased weight to the deterrent effect of a proposed remedy. The *Gissel* Court stressed the importance of deterring the extreme misconduct covered by Category I; only on a "lesser showing of employer misconduct" covered by Category II did the Court deem the goal of "effectuating ascertainable employee free choice . . . as important a goal as deterring employer misbehavior," and consequently require "a showing that at one point the union had a majority." 395 U.S. at 614.

The deterrent value of a bargaining order against an employer who has engaged in egregious illegal behavior is apparent. The prospect of a remedial bargaining order should create a strong incentive for the anti-union employer to keep its campaign within legal limits. For even if the company wins the organizational battle, it may lose the collective bargaining war. On the other hand, today's decision that no bargaining order can ever issue unless the union has gained the support of more than half the unit employees at some point in the process creates reverse and indeed perverse incentives. The anti-union employer can avoid ever dealing with a union by rushing in at the first sign of union sentiment, before employees have begun to experience the collective strength of numbers, with threats of plant closings, mass discharges and close surveillance, thereby creating an atmosphere of coercion that outlasts the tenure of current employees and outdistances the remedial powers of the Board. In-

deed, we need not conjure up such a hypothetical horror story, for the Employer here has done precisely that. The Act is dealt a debilitating blow by the majority's ruling and the Board is deprived of its only effective means to remedy and deter a massive campaign of coercive and illegal conduct by an employer bent on crushing inchoate union organization.

Thus I would uphold the Board's authority to issue a bargaining order even in the absence of a positive showing of majority support for the union in the circumstances in this case, in which (1) the employer has engaged in unfair labor practices so pervasive and outrageous that there is no reasonable possibility of a fair election, and that even the Board's ordinary and extraordinary non-bargaining remedies will not restore to employees their right to choose or reject union representation free from employer coercion; and (2) it is reasonable to conclude that the union would have gained the support of the majority but for the employer's extremely coercive illegal conduct. On this basis, I respectfully dissent.

GINSBURG, *Circuit Judge, dissenting as to the requirement that the Company's president read the Board's notice aloud to assembled employees*: I would modify the extraordinary notice remedies in one respect. The Board's order requires that Conair's President, Leandro Rizzuto, personally read the Board's cease and desist notice to an assembly of employees; I would allow Rizzuto to choose between reading the notice himself or designating a responsible officer to read it on his behalf.

The Board's order specifies that the Company's

> owner and president, Rizzuto, . . . shall . . . read the notice to current employees assembled for that purpose . . . .

Conair Corp., 261 NLRB 1189, 1285 (1982) (ALJ Opinion).

In *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir.), *cert. denied*, 454 U.S. 837 (1981), the Board similarly required that "the [Company] president, Harold Anderson, personally read a copy of the notice to an assembly of the employees." 640 F.2d at 401. Our opinion in that case summarized the history of Board public reading orders (they originated when the illiteracy of employees was a large concern), *id.* at 401-03, and noted the grave reservations this court had earlier expressed regarding such orders in *International Union of Electrical, Radio & Machine Workers v. NLRB (Scott's, Inc.)*, 383 F.2d 230, 232-34 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904 (1968). *See* 640 F.2d at 402. We enforced the public reading requirement in *Teamsters Local 115* with this modification: we directed the Board to specify as the reader, in lieu of the president, simply "a responsible officer of [the Company]." *Id.* at 403-04.

Teamsters Local 115 is distinguishable from this case. We observed there that "[o]f all the unfair labor practices found by the Board," the president had personally performed "only one." *Id.* at 403. Here, the president's personal involvement was far more conspic-

uous. His voice behind the Board's order might most authoritatively indicate to employees that Conair will comply with the directive. Nonetheless, a reading order "directed at a specified individual" is a "startling innovation." *Id.* Such an order would occasion no surprise in a system in which those who offend against state regulation must confess and repent as a means of self-correction, or to educate others. But it is foreign to our system to force named individuals to speak prescribed words to attain rehabilitation or to enlighten an assembled audience. The Board, I believe, has not thoughtfully considered this point.

A forced, public "confession of sins," even by an owner-president who has acted outrageously, is a humiliation this court once termed "incompatible with the democratic principles of the dignity of man." *International Union of Electrical, Radio & Machine Workers*, 383 F.2d at 234. It has a punitive, vindictive quality, *see Teamsters Local 115*, 640 F.2d at 401, and is the kind of personal performance command equity decrees have avoided. *See* Restatement (Second) of Contracts § 367 (1979); *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853); *cf. Lumley v. Wagner*, 1 DeG., M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852) (acknowledging lack of authority to grant specific performance of defendant's concert singing obligations, court issued injunction preventing defendant from breaching covenant not to sing elsewhere). Moreover, as Board Chairman Van de Water noted, *Conair*, 261 NLRB at 1195 n.28, a reading of the notice by the president may be less effective than a reading by another responsible officer. The former, humiliated and degraded by the personal specific performance order, may demonstrate "by inflections and facial expressions, his disagreement with the terms of the notice." *Id.* The latter, assigned the task but lacking the same personal involvement, may perform it with less distaste, more detachment, and thus with greater credibility. I would not single out the president here, or any other named individual, hand him lines, and make him sing.

GINSBURG, *Circuit Judge, separate concurring statement*: I note as a postscript to the many pages we have written that as a court of review we must wrestle with the "matters of high principle" aired in this case. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1794 (1983). The point has been made tellingly, however, that "[i]f the law is to have any chance of vindicating the employees' group right to 'bargain collectively through representatives of their own choosing,' the [relief] it promises must come quickly." *Id.* at 1793. We write as 1983 runs out about a unionization campaign that occurred in the spring and summer of 1977. The long delays at every stage of this and similar proceedings may indeed render the Board's remedies, however stiff, "beside the point." *Id.* at 1794 (footnote omitted).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 82-1623

CONAIR CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Intervenor.

[Filed Jan. 31, 1984]

JUDGMENT

Before: WALD, GINSBURG, and SCALIA, *Circuit Judges.*

THIS CAUSE came on to be heard upon a petition filed by Conair Corporation, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on May 28, 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on July 6, 1983, and has considered the briefs and transcript of record filed in this cause. On November 15, 1983, the Court, being fully advised in the premises, issued its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Conair Corporation, Edison, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating its employees concerning their union activities and sympathies.

(b) Threatening and warning its employees with loss of existing benefits or a reduction thereof if they continue to support or assist Local 222, International Ladies' Garment Workers' Union, AFL-CIO (hereafter called the Union) or any other labor organization.

(c) Soliciting employee grievances and promising that such grievances will be adjusted for the purpose of influencing their selection of a labor organization as their bargaining representative.

(d) Expressly or impliedly promising benefits to its employees to discourage assistance or support of the Union or any other labor organization.

(e) Threatening employees with plant closure and loss of employment if they continue to support or assist the Union or any other labor organization.

(f) Engaging in surveillance of union activity or creating the impression that such activity is subject to surveillance.

(g) Granting employees improved or additional new benefits for the purpose of influencing their selection of a labor organization as their bargaining representative.

(h) Discouraging membership in a labor organization by discharging, refusing to reinstate in a timely fashion or to reinstate at all, or otherwise discriminating against employees in their hire and tenure.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the unfair labor practice strikers listed in Appendix C (copy attached hereto), and Ruby Toomer, Carmen Sagardia, and Jose Santiago, immediate and full reinstatement to their former positions or, if these positions are no longer available, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole the reinstated strikers listed in Appendix B (copy attached hereto) for any loss of pay which they may have suffered by reason of their unlawfully delayed reinstatement, and make whole the unfair labor practice strikers unlawfully denied reinstatement listed in Appendix C, employee Jose Santiago (unlawfully discharged on November 10, 1977), employee Ruby Toomer (unlawfully denied reinstatement on January 25, 1978), and employee Carmen Sagardia (unlawfully denied reinstatement on February 23, 1978) for any loss of pay which they may have suffered by reason of the discrimination against them by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their discharge or denial of reinstatement to the date of their actual reinstatement, less any net interim earnings during these respective periods. The backpay due under the terms of the Judgment shall be computed in the manner prescribed by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other rec-

ords necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Mail a copy of the attached notice marked Appendix "A" to each and every employee at his or her home address, post copies thereof at its plant in Edison, New Jersey, and include a copy in appropriate company publications.[1] Copies of said notice, on forms provided by the Regional Director for Region 22 of the National Labor Relations Board (Newark, New Jersey), shall be personally signed by the Petitioner's president and owner "Lee" Rizzuto. Copies of said notice shall be mailed by the Petitioner to each and every employee working at its plant on the date on which such notice is mailed, as well as each and every employee who worked in its plant during the period of the Petitioner's unfair labor practices, and additional copies shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(e) Publish in local newspapers of general circulation copies of the attached notice marked Appendix "A". Such notice shall be published twice weekly for a period of four weeks.[2]

(f) Convene during working time all employees at its Edison, New Jersey plant, either in shifts or departments, or otherwise, and have the Petitioner's president and owner, "Lee" Rizzuto, read to the assembled employees the contents of the attached notice marked Ap-

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[1] This notice shall be prepared in both English and Spanish, and, where required to be mailed, posted or published, shall be done so in both languages.

[2] This notice shall be published in both English and Spanish.

pendix "A".[3] The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notices.

(g) Upon request of the Union made within one year of the issuance of the Judgment herein, without delay make available to the Union a list of names and addresses of all employees employed at the time of the request.

(h) Immediately upon request of the Union, for a period of two years from the date on which the aforesaid notice is posted, grant the Union and its representatives reasonable access to the plant bulletin boards and all places were notices to employees are customarily posted.

(i) Immediately upon request of the Union, for a period of two years from the date on which the aforesaid notice is posted, permit a reasonable number of union representatives access for reasonable periods of time to nonwork areas, including but not limited to canteens, cafeterias, rest areas, and parking lots, within it Edison, New Jersey plant, so that the Union may present its views on unionization to the employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

(j) In the event that during a period of two years following the date on which the aforesaid notice is posted, any supervisor or agent of the Petitioner convenes any group of employees at the Petitioner's Edison, New Jersey plant and addresses them on the question of union representation, give the Union reasonable opportunity to be present at such speech, and, upon request,

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[3] The reading of this notice by Rizzuto if performed in English shall be translated into Spanish and read in that language to the employees by a Spanish interpreter or person fluent in the Spanish language.

give one of them equal time and facilities to address the employees on the question of union representation.

(k) In any election which the Board may schedule at the Petitioner's Edison, New Jersey plant within a period of two years following the date on which the aforesaid notice is posted, and in which the Union is a participant, permit, upon request by the Union, at least two union representatives reasonable access to the plant and appropriate facilities to deliver a 30-minute speech to employees on working time, the date thereof to be not more than 10 working days, but not less than 48 hours, prior to any such election.

(l) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply therewith.

/s/ Patricia M. Wald
Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit

/s/ Ruth Bader Ginsburg
Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit

/s/ Antonin Scalia
Circuit Judge
United States Court of Appeals for the
District of Columbia Circuit

APPENDIX A

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the
United States Court of Appeals Enforcing
In Part and Denying In Part an Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights. More specifically,

WE WILL NOT discharge or in any other manner discriminate against employees because of their union activities.

WE WILL NOT threaten or warn employees with discharge, loss of benefits, or other reprisals because of their union activities, membership, or support.

WE WILL NOT threaten to close the plant in order to prevent union activities among our employees.

WE WILL NOT discharge or fail or refuse to either reinstate striking employees upon their unconditional application to return to work or fail to do so in a timely fashion.

WE WILL NOT discourage membership or activities on behalf of Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, by discharging employees or discriminating against them in their hire or tenure.

WE WILL NOT coercively interrogate employees concerning their union membership activities, or support.

WE WILL NOT solicit employee grievances and promise that such grievances will be adjusted.

WE WILL NOT promise or grant improved or additional new economic benefits or other terms or conditions of employment if they abandon their support of a union.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to never negotiate with a union should it lawfully represent our employees in order to discourage union membership, activities, or support.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the unfair labor practice strikers listed in Appendix C immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions.

WE WILL pay Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the employees and unfair labor practice strikers listed respectively in Appendices B and C for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL send to all our employees copies of this notice; WE WILL read this notice to all our employees; and WE WILL publish copies of this notice in local newspapers.

WE WILL, upon request of the Union made within 1 year of issuance of the Board's Decision and Order, make available to the Union a list of names and addresses of all our employees currently employed.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately upon request of the Union, grant the Union and its reprentatives reasonable access to our plant in nonwork areas during employees' nonworktime in order that the Union may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

WE WILL, if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, give the Union reasonable notice and give two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities also to speak to you on the question of union representation.

Our employees have the right to join Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or to refrain from doing so.

CONAIR CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-3652.

APPENDIX B

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Lucille Allen	October 4, 1977
Mario Arocho	October 4, 1977
Rosita Cruz	October 4, 1977
Christina De Armas	October 4, 1977
Florence L. Heimbuch	October 4, 1977
Carmen Irizzarry	October 4, 1977
Florence F. Jacko	October 4, 1977
Beulah Jones	October 4, 1977
Flora F. Kurtanick	October 4, 1977
Dorothy Lodato	October 4, 1977
Victor Maisonet	October 4, 1977
Irene Martinez	October 4, 1977
Laura Martinez	October 4, 1977
Miliady Mendez	October 4, 1977
Milagros Muniz	October 4, 1977
Luis B. Ortiz	October 4, 1977
Yillian T. Perez	October 4, 1977
Olga Rios	October 4, 1977
Ana Santiago	October 4, 1977
Carmen M. Sagardia	October 4, 1977
Rosaura Soto	October 4, 1977
Ismael Torres	October 4, 1977
Verta May Allen	October 11, 1977
Hector Caraballo	October 11, 1977
Hilda Della Torre	October 11, 1977
Margarita Gautier	October 11, 1977
Carmen Lopez	October 11, 1977
Luz M. Melendez	October 11, 1977
Hilda Perez	October 11, 1977
Alicia Rivera	October 11, 1977
Jose R. Rivera	October 11, 1977
Genovena Arocho	October 12, 1977
Olga Chalfa	October 12, 1977
Patricia Eaford	October 12, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Rosaria Machin	October 12, 1977
Rosalia Mendez	October 12, 1977
Jose Negron	October 12, 1977
Antonio Neiro	October 12, 1977
Julia Pellallera	October 12, 1977
Lilia Quiles	October 12, 1977
Awilda Rodriguez	October 12, 1977
Jose Santiago	October 12, 1977
Aida Iris Torres	October 12, 1977
Alberto Vargas	October 12, 1977
Elsie Vega	October 12, 1977
Adamina Nieves	October 14, 1977
Virginia Rivera	October 14, 1977
Rufino Saez	October 14, 1977
Portinia Soto	October 14, 1977
Rafael Valdes	October 14, 1977
Mayes Garcia	October 18, 1977
Gloria Guzman	October 18, 1977
Juan Hernandez	October 18, 1977
Roberto Mercado	October 18, 1977
Elizabeth Muniz	October 18, 1977
Wildilia Santiago	October 18, 1977
Sonia Torres	October 18, 1977
Felix Vasquez	October 18, 1977
Miguel Aquino	October 19, 1977
Celia Cruz	October 19, 1977
Celia Febles	October 19, 1977
Wilfredo Guerrero	October 19, 1977
Alice Jones	October 19, 1977
Noraima Mendez	October 19, 1977
Martha Parada	October 19, 1977
Jose Vazquez	October 19, 1977
Wilfredo Vazquez	October 19, 1977
Etta Burns	October 24, 1977
Hiriam Guzman	October 24, 1977
Carmen Sanson	October 24, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Alida Pabon	October 25, 1977
Michael Billings	November 2, 1977
Dominga Cruz	November 2, 1977
Martha Davison	November 2, 1977
Evelyn Lee	November 2, 1977
Annette Palmer	November 2, 1977
Denise Perrotte	November 2, 1977
Raymond Crespo	November 7, 1977
David Letendre	November 7, 1977
Richard Letendre	November 7, 1977
Ana Rose Fernandez	November 7, 1977

APPENDIX C

UNFAIR LABOR PRACTICE STRIKERS NOT REINSTATED

Shirley Bagby
Yvette Casquette
Lydia Gonzales
Enrique Luciano
Jose R. Mendez
Adolfo Nunez
Jose Nunez
Stephen Olah
Adrian Pagan
Gertrudes U. Rodriguez
Jesus Santiago
Ernesto Soto
Luz C. Villanueva

APPENDIX C

VFJZH

261 NLRB No. 178

D-8878
Edison, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 22-CA-7586,
22-CA-7672,
22-CA-7939,
22-CA-8173,
22-CA-8220,
22-CA-8238, and
22-RC-7119

CONAIR CORPORATION

and

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

DECISION AND ORDER

On July 30, 1980, Administrative Law Judge Jesse Kleiman issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We also dismiss as lacking in merit Respondent's motion to disqualify the Administrative Law Judge, vacate his Decision, and have a hearing *de novo*. Respondent contends that the Administrative Law judge should be disqualified because his Decision was prejudiced by statements made by Respondent's counsel at a settlement conference. Subsequent to the close of the hearing but prior to the issuance of the Administrative Law Judge's Decision, the parties made an attempt to settle the case and, in furtherance of their settlement attempt, they requested the Administrative Law Judge to attend a settlement conference. All of the parties attended the conference and were represented by counsel. The parties, however, were unable to agree upon a settlement, and in due course the Administrative Law Judge issued his Decision. At the settlement conference, Respondent's counsel informed the other participants that, because of economic changes unrelated to the issues involved in this case, Respondent planned to move a significant part of its New Jersey operations to its Hong Kong facility. Respondent now contends that its own post-hearing statement made in the course of settlement discussions unduly prejudiced the Administrative Law Judge and influenced the Administrative Law Judge's finding that Respondent had repeatedly threatened to move its operations to Hong Kong if the employees supported the Union, and that it also prejudiced the Administrative Law Judge's credibility resolutions which underlay many of his other findings that Respondent had violated the Act. Upon our full consideration of the record and the Administrative Law Judge's Decision, we find no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

of the Administrative Law Judge only to the extent consistent herewith,[3] and to adopt his recommended Order as modified.

The Administrative Law Judge found, and we agree, that Respondent reacted to its employees' organizational activities by violating the Act on numerous occasions and that Respondent's unfair labor practices were outrageous and pervasive violations of Section 8(a)(1) and (3) of the Act. The General Counsel and the Charging Party filed exceptions contending that the Administrative Law Judge erred by failing to find that Respondent violated Section 8(a)(3) and (1) of the Act on April 22, 1977,[4] by unlawfully discharging all of its employees who had been engaged in an unfair labor practice strike and that the Administrative Law Judge further erred by failing to find that Respondent's unlawful conduct warranted the issuance of a bargaining order.

As found by the Administrative Law Judge, the record establishes that in late March or early April 1977 the Union began an organizational campaign at Respondent's New Jersey plant. In response thereto, Respondent's officials embarked upon a course of conduct designed to intimidate and undermine its employees' support for the Union. As detailed in the Administrative Law Judge's Decision, Respondent's officials violated the Act on numerous occasions by promising benefits to its employees

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[3] In the absence of record evidence indicating that Respondent was responsible for the posting, or was aware of the existence of, signs in the restrooms which threatened plant closure, we do not adopt the Administrative Law Judge's findings that those signs violated Sec. 8(a)(1) of the Act. In addition, in accordance with the General Counsel's unopposed request, we have noted certain typographical errors in the Administrative Law Judge's Decision, and those errors will be corrected in the published volume.

[4] Unless otherwise indicated, all dates hereafter refer to 1977.

and by threatening its employees with a loss of benefits and threatening plant closure and other adverse consequences if the employees supported or sought assistance from the Union. In response to these serious unfair labor practices, the Union, with substantial employee support, commenced a strike on April 11. The Administrative Law Judge found, and we agree, that the strike was in response to Respondent's numerous unfair labor practices and hence that from its inception it was an unfair labor practice strike.

On April 20, Respondent sent mailgrams to each of its striking employees, stating as follows:

> We have called you repeatedly to return to your job, despite your promises to do so, you have failed to report for duty, there is no violence, employees freely enter the plant. Unless you report for work on Friday, April 22, 1977, at your regular starting time you will be deemed to have voluntarily quit your job.

We agree with the Administrative Law Judge's finding that the mailgram violated Section 8(a)(1) of the Act by explicitly threatening the strikers with discharge if they continued to exercise their protected concerted right to engage in a strike protesting Respondent's unfair labor practices.

The General Counsel and the Charging Party contend that the Administrative Law Judge erred by failing to find that the April 20 mailgram also violated Section 8(a)(3) and (1) of the Act by unlawfully terminating the striking employees because of their involvement in protected concerted activity. We agree.[5] Initially, we

[5] In its brief in response to the exception of the General Counsel and the Charging Party Respondent contends that the complaint does not allege that the April 20 mailgram terminated the strikers in violation of Sec. 8(a)(3) and (1) of the Act and therefore the Board cannot now find that the mailgram violated Sec. 8(a)(3) and (1). Although Respond-

note that the clear language of the mailgram establishes Respondent's intention to terminate the strikers because of their involvement in strike activities.[6] Further, if the strikers had any doubts as to their employment status after April 22, Respondent's subsequent conduct clearly established that they had in fact been discharged on April 22. Thus, Respondent admitted that it deemed its striking employees to have quit their jobs when they did not report for work in response to the mailgrams. In addition, on June 9, Respondent sent its striking employees a letter which offered the employees reinstatement to their former jobs "if" they unconditionally abandoned the strike immediately. Finally, when the strikers began returning to their jobs in October and November, they were told that they were new hires and "new hires" was written on their timecards. Accordingly, we find that

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ent asserts that it had no notice that the April 20 mailgram would be litigated as a violation of Sec. 8(a)(3), the complaint specifically alleges that the mailgram threatened employees with discharge in violation of Sec. 8(a)(1), and other paragraphs of the complaint allege that other conduct by Respondent violated Sec. 8(a)(3). Further, in its exceptions, Respondent argues that the law and the interpretation of the facts now in the record do not support the finding of a violation. Respondent does not argue that it was precluded from adducing any exculpatory facts or that it would have altered its presentation of the case in any manner. Accordingly, we find no merit to Respondent's contentions since the issue was fully litigated and all of the operative facts underlying the finding of an 8(a)(3) and (1) violation are present in the record. *Southern Newspapers, Inc., d/b/a The Baytown Sun*, 255 NLRB No. 22 (1981), and cases cited therein at fn. 1.

[6] Even if we were to find that the language of the mailgram had created an ambiguity regarding the strikers' employment status, the burden of the results of that ambiguity must fall on Respondent. Thus, viewing the mailgram from the perspective of the striking employees, we find that the mailgram conveyed the message that, if the employees did not abandon the strike and report to work by April 22, they would no longer be in Respondent's employ. *Pennypower Shopping News, Inc.*, 253 NLRB 85 (1980).

Respondent's April 20 mailgram was an unlawful attempt to break the strike by conditioning the strikers' continued employment upon the abandonment of their protected right to engage in an unfair labor practice strike and that Respondent unlawfully discharged its striking employees on April 22 in violation of Section 8(a)(3) and (1) of the Act.[7]

In view of our finding that the strikers were unlawfully discharged on April 22, we further find that they were under no obligation to seek reinstatement. As set forth in *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), unlawfully discharged strikers are treated in the same manner that other discriminatorily discharged employees are treated; discharged strikers are not required to request reinstatement in order to activate an employer's backpay obligation. Thus, an unlawful discharge triggers a backpay obligation where through its words and/or action an employer causes its "employees reasonably to believe that they had been discharged or that their continued employment status was questionable, because of their participation in protected concerted activity . . . ."[8] Accordingly, we have modified the Administrative Law Judge's remedy to conform to our additional finding that Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging its striking employees on April 22, 1977.

As set forth fully in the attached Decision, the Administrative Law Judge found that Respondent committed extensive unfair labor practices from early April through the election on December 7, 1977. These violations of the Act included: Numerous threats of plant closure, discharge, and loss of benefits; numerous promises of increased or new benefits; coercive interrogation of em-

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[7] *Accurate Die & Manufacturing Corp.*, 242 NLRB 280 (1979), and *Pennypower Shopping News, Inc., supra.*

[8] *Pennypower Shopping News, Inc., supra* at 85.

ployees; numerous acts of soliciting employee grievance with promises to remedy the same; grants of numerous benefits to employees; creating the impression of surveillance; the failure to give timely reinstatement to 36 unfair labor practice strikers; and the outright discharge and refusal to reinstate 16 other unfair labor practice strikers. We agree with the Administrative Law Judge's findings of violations and with his conclusion that those unfair labor practices committed during the critical preelection period constituted objectionable conduct sufficient to warrant setting aside the election.[9]

The Administrative Law Judge further found that Respondent's unfair labor practices were so "outrageous" and "pervasive" as to fall within the first category of unfair labor practice cases described in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 613-617 (1969). In sum, the Administrative Law Judge found that Respondent's conduct presented the "exceptional" case where the coercive effect of the unfair labor practices "cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." Although the Court indicated in *Gissel* that a first category case justified the issuance of a remedial bargaining order "without need of inquiry into majority status on the basis of cards or otherwise," [10] the Admin-

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[9] In addition, as set forth above, we have further found that Respondent violated Sec. 8(a)(3) by its mass discharge of strikers on April 22, 1977.

[10] The *Gissel* opinion described two other categories of unfair labor practices cases. The second category consists of "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Court expressly approved the Board's use of a remedial bargaining order in second category cases where the union at one time had majority support and "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies,

istrative Law Judge found that the Union had failed to establish that it had at any time obtained a clear showing of support from a majority of Respondent's employees and he therefore declined to recommend that Respondent be ordered to recognize and upon demand bargain with the Union as the exclusive bargaining representative of Respondent's employees. In so doing, the Administrative Law Judge discussed *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), and noted that there the Board was presented with facts similar to those of the instant case wherein unfair labor practices committed by a respondent-employer had been outrageous and pervasive, but the Board nevertheless declined to issue a bargaining order because the union therein had failed to obtain a card majority.[11]

Subsequent to the issuance of the Administrative Law Judge's Decision in this case, the United States Court of Appeals for the Third Circuit enforced the Board's Order in *United Dairy Farmers Cooperative*,[12] and further

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though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." The third category of unfair labor practices described in *Gissel* consists of "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 613-615.

[11] In the plurality opinion which became the basis of the Board's Order, former Members Murphy and Truesdale recognized that the Board "may" have the authority to issue a bargaining order in the absence of a card majority, but judged that the facts of that case did not warrant such an order. Former Member Penello, concurring and dissenting, concluded that the Board lacked the authority to issue a bargaining order where a union had been unable to obtain a card majority. Then Chairman Fanning and Member Jenkins, concurring and dissenting, found that the Board possessed the authority to issue such a bargaining order in appropriate circumstances, and further found that a bargaining order was warranted in the circumstances of that case.

[12] 633 F.2d 1054 (3d Cir. 1980).

found that the Board possesses the authority to issue a nonmajority bargaining order in exceptional cases where a respondent's "outrageous" and "pervasive" unfair labor practices eliminated any reasonable possibility of holding a free and uncoerced election. Accordingly, the court remanded the case and directed the Board to consider whether a bargaining order should issue in that case. The Board accepted the remand and in a Supplemental Decision and Order found that the respondent's outrageous and pervasive unfair labor practices had "completely foreclosed the possibility of a fair election" [13] and that therefore, even though the union had failed to demonstrate majority support, a bargaining order was warranted and justified.[14]

Accordingly, in light of this precedent, we have carefully reviewed the facts of this case. Although the Administrative Law Judge's well-reasoned Decision set forth in voluminous detail Respondent's outrageous and pervasive unlawful conduct, we find it appropriate to review briefly the salient events in order to present a perspective on Respondent's unlawful conduct. As indicated earlier, in late March 1977, the Union began organizing Respondent's production and maintenance employees. Almost immediately thereafter, Respondent's officials embarked upon a course of conduct designed to intimidate and undermine its employees' support for the Union. Thus, in early April Respondent began holding a series of meetings with its employees in large and in small groups.[15]

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[13] 257 NLRB No. 129 (1981), sl. op. at p. 11.

[14] Then Chairman Fanning and Member Jenkins adhered to their position, as set forth in the original Decision and Order in that proceeding, that the Board possesses the authority to issue a nonmajority bargaining order. Member Zimmerman respectfully recognized the Third Circuit's decision as binding upon the Board for the purpose of deciding that case.

[15] The meetings were unprecedented and were a marked departure from Respondent's past practice; additionally, the

The meetings were held prior to the strike, during the strike, and during the post-strike period up to the representation election on December 7. At these meetings and on numerous occasions, Respondent's executive and lower ranking supervisors threatened employees with plant closure, discharge, and loss of benefits if they continued to support the Union. Respondent also made numerous promises of increased or new benefits, solicited grievances, and made implied and explicit promises to remedy those grievances. In addition, Respondent interrogated many of its employees about their union activities and created the impression that its employees' union activities were under surveillance.

Within several days of April 4, the date that Respondent began its unfair labor practices, a group of employees (25-30) appeared at the union hall and requested the return of their signed authorization cards because they feared losing their jobs. The employees explained to the union agents that Respondent had threatened plant closure, discharges, loss of benefits, and other dire consequences if they continued to support the Union. The union officials responded that such conduct violated the National Labor Relations Act and that the employees could strike in protest of Respondent's unfair labor practices. The employees responded enthusiastically to the suggestion of a strike, and, on April 11, the Union, with substantial employee support, commenced a strike action. As indicated previously, we have found that the strike was an unfair labor practice strike from its inception until its cessation on September 23.

In response to the strike, Respondent escalated its campaign of unfair labor practices. As set forth earlier,

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manner in which the meetings were conducted constituted an attempt to solicit employee grievances and indicated that those grievances would be satisfied. We agree with the Administrative Law Judge that such conduct violated Sec. 8(a)(1) of the Act.

Respondent threatened to discharge strikers and, on April 22, it carried out its threat and unlawfully terminated all of the unfair labor practice strikers because of their involvement in protected concerted activity. In addition, Respondent repeated its threats of discharge and plant closure on a number of occasions during the course of the strike. Respondent also interrogated employees about their union activities, and by interrogations, statements, and videotaping of the strike action, Respondent created the impression that the employees' union activities were under surveillance. At the same time, Respondent offered increased benefits and better working conditions to nonstriking employees. When a number of strikers attempted to return to their jobs, Respondent treated them as new employees and required them to sign papers waiving their Section 7 rights. The employees, however, refused to return to work under those unlawful conditions, and Respondent again violated the Act by treating them as if they had abandoned their employment.

When the Union called an end to the strike and unconditionally requested Respondent to reinstate immediately the discharged strikers, Respondent instituted a discriminatory reinstatement policy and again violated Section 8(a)(3) of the Act. Thus, instead of offering the discriminatorily discharged strikers immediate reinstatement, Respondent slowly reinstated the discharged strikers over a 6-week period while continuing to employ its strike replacements. Further, when the discharged strikers were reinstated, they were treated as new hires and were not permitted to retain their seniority which entitled them to better working conditions, privileges, and benefits. Respondent also refused reinstatement to a number of discharged strikers, allegedly because of their involvement in strike misconduct. We agree with the Administrative Law Judge that Respondent did not have a reasonable basis for believing that these strikers had engaged in strike misconduct and that refusal to

offer them reinstatement violated Section 8(a)(3) of the Act. Finally, in November, Respondent discharged a previously reinstated striker because of his prior involvement in the strike and, after the election, Respondent discharged two other previously reinstated strikers because of their support for the Union.

As the election date neared, Respondent intensified its unlawful activity. Respondent continued to solicit grievances and implicitedly and explicitedly promised to remedy those grievances. Respondent also implemented better working conditions and made further promises of increased benefits. The number of its unlawful interrogations and threats also increased. For example, several weeks before the election, employees participating in Respondent's profit-sharing plan were given a "Statements of Accounts" with a message stamped on the front page which indicated that the profit-sharing plan was not for union members. Finally, in attempt not to leave anything to chance, posters and printed literature indicating that union members would not receive a Christmas bonus and that if the Union won the election Respondent would close the plant and move to Hong Kong were posted throughout the plant in work areas, the cafeteria, and hallways.

In *United Dairy II*, the Board identified the "gravity, extent, timing, and constant repetition" [16] of violations found as the interrelated factors to be examined in determining whether a respondent employer's unlawful conduct was so "outrageous' 'and "pervasive" as to fall within the first *Gissel* category of "exceptional" cases.

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[16] 257 NLRB No. 129, sl. op., p. 11. In addition to focusing on repetition of specific unfair labor practices within a single case, the Board noted that recidivism is an important element to be weighed. It is not, however, a prerequisite to placing an employer's conduct in the first *Gissel* category. In the instant case, there is no evidence that Respondent engaged in unfair labor practices predating those described above.

Such an examination here compels the finding that Respondent's opprobrious conduct clearly belongs in the first *Gissel* category.

There can be no doubt of the extreme gravity of Respondent's violations of the Act. In particular, the numerous discriminatory discharges are serious unfair labor practices which go "to the very heart of the Act" and have a lasting coercive impact on employees.[17] Respondent discharged all unfair labor practice strikers within 3 weeks of learning about the Union's nascent organizational campaign in April. This mass discharge imparted in dramatic fashion the unmistakable message that loss of employment was the price to be exacted for the exercise of Section 7 rights. In subsequent months, Respondent reinforced and embellished this coercive message by repeatedly threatening discharge, by discriminatorily refusing reinstatement to some discharged strikers, by discriminatorily delaying reinstatement of other strikers, by discriminatorily discharging reinstated strikers, and by repeatedly threatening plant closure in retaliation against the Union's campaign. Moreover, these unfair labor practices were only the most serious among the many committed by Respondent.[18]

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[17] See, e.g., *United Dairy II*, *supra* at sl. op., p. 8, and cases cited there.

[18] Even under the dissenters' view that we are precluded from considering whether Respondent's mailgram unlawfully discharged the striking employees on April 22, the coercive impact of the mailgram's threat to discharge remains virtually the same. Moreover, even in the absence of the April 22 discharge finding, Respondent's numerous unfair labor practices reached the highest level of severity. Compare *The Sinclair Company* v. *N.L.R.B.*, 395 U.S. 575 (1969), a case consolidated with *Gissel* for consideration by the Court. In *Sinclair*, the respondent's president unlawfully threatened all employees with plant closure on five separate occasions during an organization and election campaign. The Court indicated that these five 8(a)(1) violations alone were sufficiently "outrageous" and "pervasive" to warrant classification in the first *Gissel* category.

Respondent's unlawful conduct carried its coercive message to every employee in the relatively large unit. Respondent's highest executive officials openly committed many unfair labor practices, enhancing the impression of a centrally coordinated, companywide plan to deny employees their Section 7 rights and increasing the likelihood that all employees would understand and credit any threats made. In addition, officials at all levels of Respondent's managerial hierarchy utilized mass communications with employees to insure maximum dissemination of unlawful threats, solicitation of grievances, and promises of benefits.

Finally, both the repetition and timing of Respondent's unfair labor practices exacerbated their long-term coercive impact. The chilling effect on employee rights of a single discharge or threat of plant closure is difficult enough to erase. Several repetitions of these and other violations of the Act multiply the strength and duration of the impression left on employees. The same multiplier effect results from the manner in which Respondent timed its unlawful conduct—i.e., swift and severe initial retaliation against the Union's organizational efforts, a lengthy campaign of unfair labor practices, an increase in violations as the election neared, and two unlawful discharges even after the election. In moment and duration, the timing of Respondent's unfair labor practices underscored its enduring resolve to oppose unionization by any means and deeply imprinted on employee memories the drastic consequences of seeking union representation.

It is clear from the foregoing that this case is the "exceptional" type envisioned in *Gissel* which warrants the insurance of a remedial bargaining order "without need of inquiry into majority status on the basis of cards or otherwise." We find that neither our traditional remedies nor even our extraordinary access and notice remedies can effectively dissipate the lingering effects

of Respondent's massive and unrelenting coercive conduct. By this conduct Respondent has foreclosed any possibility of holding a fair representation election. Under these exceptional circumstances, we find that a remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization. Anything short of a bargaining order would deny employees that right which has been the hallmark of national labor policy for nearly five decades.

We categorically reject our dissenting colleagues' arguments that either the Act or Board policy bars issuance of a nonmajority bargaining order in this case. Their view of the Board's remedial authority lacks any direct judicial support[19] and errs by focusing so narrowly and abstractly on the principle of majority rule. That principle is, unquestionably, an important feature of the Act, but it has never been interpreted as standing

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[19] Reviewing judicial precedent, the Third Circuit stated in *United Dairy* that "Although several commentators have observed that the [*Gissel*] Court did not specifically endorse the issuance of bargaining orders in the absence of a card majority, virtually every court that has discussed the issue has stated that a bargaining order may be issued in the absence of a card majority." 633 F.2d 1054, 1066, and see cases cited there. Although the D.C. Circuit indicated some reservations about the propriety of a nonmajority bargaining order in *Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Haddon House Food Products, Inc. and Flavor Delight, Inc.*] v. *N.L.R.B.*, 640 F.2d 393 (1981), cert. denied, 102 S.Ct. 141, 92 LC ¶ 13,018 (1981), it expressly reserved from deciding the issue. See also *Local 57, International Ladies' Garment Workers' Union, AFL-CIO* [*Garwin Corporation*] v. *N.L.R.B.*, 374 F.2d 295 (D.C. Cir. 1967); *New York Hotel and Motel Trades Council* [*F.W.I.L. Lundry Bros. Restaurant, Inc.*] v. *N.L.R.B.*, 109 LRRM 2779 (D.C. Cir. 1982).

in supreme isolation from the Board's other statutory policies and purposes.[20]

Furthermore, we reject our colleagues' assertion that their position best protects the principle of majority determination. Neither they nor we can state with complete certainty whether a majority of Respondent's employees actually desired representation by the Union prior to the onset of Respondent's unfair labor practices. Neither they nor we could predict with total certainty the outcome of the Union's organizational campaign if Respondent had not repeatedly and illegally interfered. The record reveals only that approximately 46 percent of the employees had at one time openly expressed their support for the Union by signing authorization cards.[21] There is no indication of the degree of antiunion sentiment among the employees at that time. Of paramount significance, however, is the fact that, but for Respondent's unlawful conduct, its employees would have had the opportunity to express openly their opinions about unionism and to resolve the representation debate by making a free and uncoerced majority choice in a Board-conducted election. Respondent, by the massive and numerous violations discussed above, has destroyed any opportunity for free and open debate of the representation question. Our dissenting colleagues attempt to cloak their tolerance of Respondent's actions in a defense of majoritarian principle. We reject that masquerade. It is

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[20] See, e.g., *N.L.R.B.* v. *Gissel Packing Co., supra; N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324 (1946); *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (1944); *Pinter Bros., Inc.*, 227 NLRB 921 (1977); *Piper Industries, Inc., Plastic Products Division*, 212 NLRB 474 (1974).

[21] We have not resolved the challenges to each and every authorization card or to the eligibility of every voter because no resolution was necessary to decide the issues presented here. It is clear, however, that the figures set forth by the Administrative Law Judge in fn. 501 of his Decision are at least accurate approximations.

they, not we, who accept and perpetuate Respondent's denial to employees of their right to determine for themselves whether or not to be represented.

We remain convinced that the correct view of *Gissel*, including the proper exercise of the Board's remedial authority, and the most effective application of majoritarian principles is that expressed by then Chairman Fanning and Member Jenkins in the original *United Dairy* Decision, endorsed by the United States Court of Appeals for the Third Circuit, and followed by the Board in *United Dairy II*. Specifically, in the exceptional *Gissel* category 1 case, we find that the risk of imposing a minority union on employees for an interim remedial bargaining period is greatly outweighed by the risk that, without a bargaining order, all employees would be indefinitely denied their statutory right to make a fair determination whether they desire union representation. "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition." *N.L.R.B.* v. *Gissel*, *supra* at 613.

Whether or not we order bargaining, the employees, as even the dissent must admit, will have lost their right to select a bargaining representative by virtue of the employer's unfair labor practices. We recognize that the right to reject representation must be balanced against the right to select representation. As the Supreme Court has said of the analogous conflict between organizational and property rights, "Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." [22] Accordingly, a remedial bargaining order, rather than the remedies advocated by the dissent, best vindicates the employees' right of self-determination. No other remedy will

[22] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1955).

as quickly and effectively provide the opportunity for employee free choice which the Act mandates us to protect.

Moreover, in concluding that a bargaining order is warranted here, we note that the risk of even temporarily contravening the wishes of an employee majority is lessened by the Union's quondam card showing of support from approximately 46 percent of Respondent's employees. Even after bearing the brunt of Respondent's misconduct for nearly 9 months, approximately one-third of participating voters still cast ballots for the Union. Accordingly, we find that here, as in *United Dairy*, a reasonable basis exists for concluding that the Union would have enjoyed majority support but for Respondent's unfair labor practices.

We would not, however, necessarily withhold a bargaining order in the absence of a close election vote, a high majority percentage card showing, or any other affirmative showing of a reasonable basis for projecting a union's majority support. The critical predicate to issuance of a nonmajority bargaining order is the Board's finding, based on the factors previously enumerated, that an employer's unlawful conduct fits the *Gissel* category 1 description.[23] A bargaining order to remedy conduct in this category may well be warranted "without need of inquiry into majority status on the basis of cards or otherwise." This statement by the *Gissel* Court implicitly presumes that, in the absence of unfair labor practices, the issue of union representation remains in reasonable doubt and subject to the persuasive forces of employees

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[23] Contrary to Member Hunter's dissenting opinion, we perceive no great difficulty in objectively distinguishing the "exceptional" *Gissel* category 1 case from cases involving less serious unfair labor practices. Compare the instant case with *United Supermarkets, Inc.*, 261 NLRB No. 179, issued this same day, wherein the Board has found a nonmajority bargaining order inappropriate.

exercising their Section 7 rights until employees definitively reject representation by failing to give majority support to a union in a fair election. Accordingly, if an employer's "outrageous" and "pervasive" unfair labor practices have completely foreclosed the possibility of a fair representation election, the Board will issue a nonmajority remedial bargaining order because it is the only effective means of restoring employee's representational rights.

Finally, we note that Respondent commenced its unlawful campaign on April 4, 1977, by threatening plant closure and loss of benefits if its employees supported the Union. In accordance with our established practice,[24] and in order to prevent any intervening unilateral changes from going unremedied, we shall impose the bargaining obligation on Respondent as of April 4, 1977.

Amended Conclusions of Law

Insert the following as Conclusion of Law 4:

"4. By unlawfully discharging its striking employees on April 22, 1977, and by failing and refusing to timely reinstate the employees listed in Appendix B; by unlawfully discharging its striking employees on April 22, 1977, and by failing and refusing to reinstate at all the employees listed in Appendix C; and by subsequently discharging and failing and refusing to reinstate Ruby Toomer, Carmen Sagardia, and Jose Santiago, all because they had engaged in union or other protected concerted activity, with the intent to discourage unit employees from engaging in protected concerted activity Respondent has engaged in unfair practices in violation of Section 8(a)(3) and (1) of the Act."

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[24] See *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977). For the reasons expressed in his concurring opinion in that case, in addition to the fact that this order is remedial only, Member Fanning would make the bargaining order prospective only.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Conair Corporation, Edison, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified: [25]

1. Substitute the following for paragraphs 2(a) and (b):

"(a) Offer the discharged unfair labor practice strikers listed in Appendix C, and Ruby Toomer, Carmen Sagardia, and Jose Santiago, immediate and full reinstatement to their former positions or, if these positions are no longer available, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

"(b) Make the employees listed in Appendix B, the discharged unfair labor practice strikers in Appendix

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[25] In setting forth his recommended order, the Administrative Law Judge noted that the nature and extensiveness of Respondent's unfair labor practices rendered the Board's conventional remedies insufficient to dissipate the effects of Respondent's outrageous and pervasive conduct. In fn. 530 of his Decision, however, the Administrative Law Judge indicated that certain provisions of his recommended Order would be applicable only so long as an appropriate certification did not issue. We agree with the Administrative Law Judge's analysis that an extraordinary remedy is needed to dissipate the effects of Respondent's unlawful conduct. However, we find no reason to limit any of the provisions of the Order because of the issuance of a certification or because we have issued a bargaining order. Accordingly, in adopting the Administrative Law Judge's recommended Order, as modified, we do not adopt his fn. 530. See the Supplemental Decision and Order in *United Dairy Farmers Cooperative Association*, 257 NLRB No. 129.

C, and the subsequently discharged employees Ruby Toomer, Carmen Sagardia, and Jose Santiago whole for any loss of pay which they may have suffered by reason of the discrimination against them by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their discharge to the date of their actual reinstatement, less any net interim earnings during these respective periods. The backpay due under the terms of the recommended Order shall computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)." [26]

2. Insert the following as paragraph 2(m):

"(m) Upon demand recognize Local 22, International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive representative of all employees included in the unit found appropriate in Case 22-RC-7119, and bargain with that Union in good faith, and, if an understanding is reached, embody it in a signed agreement."

3. Substitute the attached notices for those of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held on December 27, 1977, in Case 22-RC-7119, be, and it hereby is, set aside.

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[26] With respect to the backpay involved, Member Jenkins would compute the interest in accordance with the formula set forth in his partial dissent in *Olylmpic Medical Corporation*, 250 NLRB 146 (1980).

Dated, Washington, D.C. May 28, 1982

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

CHAIRMAN VAN DE WATER, concurring in part and dissenting in part:

I cannot join my colleagues in issuing a bargaining order in violation of the majority rule principle which lies at the heart of the statutory scheme and our democratic society. Rather, I agree with former Member Penello that the "[h]oldings of the Supreme Court, the plain words of the statute, and its legislative history . . . establish that the Board's remedial authority is limited by the majority rule doctrine."[27] But even if the Board did not lack the requisite statutory authority, I could not conclude that employee free choice is best effectuated by imposing a labor organization upon employees without their consent. Recognizing that the Board's conventional remedies are not adequate to insure that a second election would be concluded in an atmosphere free from the coercive effects of Respondent's egregious misconduct, I join my colleagues in granting extraordinary remedies other than a bargaining order.[28]

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[27] *United Dairy Farmers Cooperative Association*, 242 NLRB 1026, 1038 (1979) (Member Penello, concurring in part and dissenting in part), remanded 633 F.2d 1054 (3d Cir. 1980), decision on remand 257 NLRB No. 129 (1981).

[28] With regard to the merits, I agree with all but one of the majority's unfair labor practice findings. For the reasons stated by Member Hunter in his separate opinion, I believe that the issue of whether Respondent unlawfully discharged its striking employees was not fairly and fully litigated.

With regard to the extraordinary remedies short of a bargaining order imposed by my colleagues, I note that these measures were recently upheld, with one modification, by the District of Columbia Circuit. *Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Haddon House Food Products, Inc. and Flavor Delight, Inc.]* v. *N.L.R.B.*, 640 F.2d 392 (1981), cert. denied, 102 S.Ct. 141, 92 LC ¶ 13,018 (1981). The court disagreed with the provision requiring that the notice be read by the respondent's owner and substituted "a responsible officer of Respondent." With this modification, I join in granting the extraordinary remedies in this case. In

In the *United Dairy* case, former Member Penello stood alone, as he was the only one who concluded that the Board lacked the statutory authority to issue a bargaining order in favor of a union that never commanded majority support. His separate opinion is too lengthy to quote in full and too well stated to summarize effectively. Suffice it to say that I subscribe fully to the views expressed in parts I and II of his opinion. In part I, former Member Penello analyzed the Supreme Court's decision in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and concluded that "even under the interpretation of *Gissel* most favorable to [his colleagues], all that can fairly be said is that the Court left open the issue of whether the Board has the statutory authority to issue a bargaining order in the absence of a showing that the union ever enjoyed majority support." Former Member Penello discussed that issue fully in part II of his opinion. On the basis of his review of the statute's provisions, particularly Section 9(a), the Act's legislative history, and interpretative Supreme Court decisions, he reached the conclusion, with which I completely agree, that "if a labor organization is to become a bargaining representative in the absence of a showing of majority support, the decision must be made by Congress, the body which constructed the Act with the majority rule principle as its foundation."

On petitions for review and cross-application of enforcement, the Third Circuit held in *United Dairy* that "the Board has the remedial authority to issue a bargaining order in the absence of a card majority and election victory if the employer has committed such 'outrageous' and 'pervasive' unfair labor practices that there is no

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my opinion, a reading of the notice by a responsible officer other than Respondent's owner may be more effective because the latter is more likely to demonstrate, by inflections and facial expressions, his disagreement with the terms of the notice.

reasonable possibility that a free and uncoerced election could be held." 633 F.2d at 1069. The court left open the issue of whether the authority exists even "when there is no reasonable possibility that the union would have attained an election majority but for the action of the employer," stating that in *United Dairy*, where the union lost the election by only two votes, "a reasonable possibility exists." *Id.* at footnote 16.

The Third Circuit acknowledged that the issue before it was "not specifically reached" by the Supreme Court in *Gissel*, 633 F.2d at 1056, and that the Court's description in *Gissel* of category 1 cases is subject to varying interpretations. 633 F.2d at 1065-66. The Third Circuit also recognized that in all post-*Gissel* cases discussing the issue the union had attained majority status and therefore "the courts have not been confronted precisely with the factual situation of this case." 633 F.2d at 1066. Consequently, the Third Circuit found it necessary to analyze the *Gissel* reasoning in detail.

According to the Third Circuit, "[t]he rationale adopted by the Supreme Court suggests that the mere absence of . . . majority support does not in itself preclude the issuance of a bargaining order by the Board." 633 F.2d at 1068. The Third Circuit regarded as more significant the fact that in *United Dairy*, as in *Gissel*, employer unfair labor practices seriously tainted the election process. "Just as a card majority could provide a better basis for testing employee preferences, so in this case may a bargaining order better further overall employee sentiment when the union has not secured a card majority and the employer has seriously undermined the validity of a union election." *Id.* Without such an order, the court concluded, "the underlying goal of the Act" of majority rule would be undermined because unions which would have prevailed in a free election would be deprived of representative status merely because of the employer's wrongful conduct. *Id.* Finally, the court emphasized that

the authority to issue a nonmajority bargaining order was necessary to deter illegal acts and considered this authority analogous to the Board's authority under *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702 (1944), and subsequent cases, to compel an employer to bargain with a union whose majority was dissipated after the commission of the unfair labor practices.

Although I recognize that this case could be appealed to the Third Circuit, I must respectfully express my disagreement with the court's decision because it conflicts with the clear terms of the statute and it misconstrues Supreme Court precedent. In analogizing the issuing of a bargaining order in the *United Dairy* case to the issuing of such an order in *Gissel*, the court overlooked a fundamental difference between the two cases. In *Gissel*, the Supreme Court emphasized that a bargaining order would serve "to re-establish the conditions as they existed before the employer's unlawful campaign." 395 U.S. at 612. This principle that Board remedies should restore the *status quo ante* is well established.[79] Unlike the situation in *Gissel*, the union in *United Dairy* never achieved majority status and thus a bargaining order would not restore the *status quo ante*.[80] Rather, the court speculated over the likelihood that the employees would have chosen the union to represent them in the absence of the employer's extensive unfair labor practices. Such speculation on the part of the court does not comport with the statutory requirement of Section 9(a) that unions in fact be "designated or selected" by a majority of employees.

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[79] E.g., *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941).

[80] The court's reliance on the *Franks Bros.* line of case law is also misplaced, as in those cases the Board's authority to issue a bargaining order is likewise derived from the principle of restoring the *status quo ante*.

It appears that the court was concerned with the far-reaching implications of the doctrine it announced. For it limited its holding to cases where there is "a reasonable possibility" that the union would have attained majority status "but for" the employer's unfair labor practices, and left open the question of whether the Board would have the authority to issue a bargaining order "when . . . no [such] reasonable possibility" exists.[31] There are two basic problems with this suggested distinction.

First, a "reasonable possibility" standard finds absolutely no support in *Gissel*. As the Third Circuit itself indicated earlier in its opinion,[32] under its interpretation of category 1 of *Gissel*, the only requirement is that the employer's unfair labor practices be so "outrageous" and "pervasive" that a fair election cannot be had. If the court's interpretation is correct,[33] then once it is shown that the employer's unfair labor practices have eliminated the possibility of holding a fair election, a bargaining order should issue, even if the union obtained cards from only one, or for that matter none, of the employees.

Second, a standard of "reasonable possibility" will not safeguard employee rights in cases such as this. In the law review article cited by the court advocating the "reasonable possibility" standard, the author suggested that the risk of imposing a union on nonconsenting employees would be minimized if the union were required "to demonstrate that a substantial proportion—say, thirty per cent—of the employees had signed membership cards prior to

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[31] In this regard, the court cited, *inter alia*, Professor Bok's article, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act." 78 Harv. L. Rev. 38, 138-139 (1964).

[32] 633 F.2d at 1066.

[33] I agree with former Member Penello that it is not. See part I of his separate opinion. 242 NLRB at 1039-40.

the commission of the unfair labor practices."[34] However, as former Member Penello has pointed out, the same 30-percent showing is required by the Board as a minimum before it will conduct an election, and "we know for a fact that employees vote against collective representation in more than half of all cases (43 NLRB Annual Report 266-267 (1978))."[35] Even if this figure only roughly approximates true employee sentiment in cases involving aggravated unfair labor practices and the absence of a prior showing of majority status, the sacrifice of employee free choice resulting from issuing bargaining orders under these circumstances would be monumental indeed. In short, a "reasonable possibility" standard is no substitute for the statutory requirement of majority support.

Finally, the validity of the Third Circuit's *United Dairy* decision has been called into question by the only court to discuss it to date. In *Haddon House*, *supra*, the District of Columbia Circuit, while finding it unnecessary to resolve the issue, stated as follows with regard to the Third Circuit's decision: "We do not share that court's confidence that the Board's authority is so broad. . . ." 640 F.2d at 397, footnote 7. The court continued:

> In an appropriate case this court may have to confront squarely the dilemma raised by Member Penello. This is not, however, a confrontation to be precipitated hastily, involving as it does the danger of unjustifiably imposing a bargaining representative against the will of the employees. The free choice of the employees is best determined through the inexorable logic of a secret ballot election. The Supreme Court has recognized that "the election process

[34] Bok, *supra* at 138.

[35] 242 NLRB at 1043, fn. 65.

For the fiscal year ending September 30, 1980, unions won 45.7 percent of the 8,198 conclusive representation elections the Board conducted. 45 NLRB Ann. Rep. 270 (1980).

> ha[s] acknowledged superiority in ascertaining whether a union has majority support," *Linden Lumber Division* v. *N.L.R.B.*, 419 U.S. 301, 304, 95 S.Ct. 429, 431, 42 L. Ed. 2d 465 (1974). Where employer misconduct has destroyed the possibility of a free election, the Court has approved the Board's reliance on authorization cards as "the most effective —perhaps the only—way of assuring employee choice," *Gissel*, 395 U.S. at 602, 89 S.Ct. at 1934. But for a government body to bypass the employees altogether, and impose a bargaining representative merely on the basis of its own assessment of the employees' needs, would pose a serious threat to employee freedom of choice.

I agree with that court's observations and share its concerns.

In conclusion, the decision issued by my colleagues today offends the congressional intent clearly expressed in the statute and in the legislative history that bargaining representatives are to be selected by the majority. In a larger sense, my colleagues' decision is alien to those values recognized as uniquely American. When a governmental body in Washington imposes upon its constituents a labor organization not of their own choosing, we have drifted far from this Nation's democratic ideals.

Dated, Washington, D.C. May 28, 1982

JOHN R. VAN DE WATER, Chairman
NATIONAL LABOR RELATIONS BOARD

MEMBER HUNTER, concurring in part and dissenting in part:

The question presented today is a simple one: "Should the decision on whether a particular group of employees will be represented by a collective-bargaining agent be made by this Board, or should it be made by the employees most immediately affected by that decision?" In my view, to state the question in these simple terms, devoid of rhetoric and obfuscation, is to point clearly the way to its proper answer. Because the majority, acting against precedent and logic, has reached the wrong answer and has decided that this Board can, and should, take from employees the right to settle for themselves the matter of a bargaining agent, I must dissent.

At the outset I note that I share with the Chairman a deep concern that the course which the majority has chartered for this Board is one that is proscribed by the statute itself. In this connection I commend a close reading of the opinion issued this day by Chairman Van de Water in the instant case.[36] However, the question of a clear statutory impediment to the issuance of a nonmajority bargaining order aside, I am convinced that there are important policy reasons that argue powerfully against the majority's attempt to break new ground by eschewing the principle of majority rule and issuing a bargaining order where no majority status has even been demonstrated.

In the first place, I believe that the principle of majority rule is so much a part of established Board policy and Board precedent, and looms so large in the public's understanding and acceptance of this Board's function in industrial life, that undercutting that principle by issuing a nonmajority bargaining order can serve only to diminish

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[36] See also former Member Penello's partial concurrence and partial dissent in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026, 1038 (1979).

the heretofore widely held public view of the Board as an impartial agency that protects the employees' *right* to choose under Section 7 of the Act, but does not make that choice *for* employees.

Nor am I concerned only that the public perception of this Board and its proper function will be damaged. When all is said and done, it is the particular employees involved here who will have to live with the Board's selection of a bargaining representative for them. And this selection has been accomplished without benefit of an election or *any* other clear and objective manifestation that the selection of that representative reflects the wishes of a majority of the employees. Of course, at the heart of it, that is the fatal flaw in the approach endorsed by the majority. Thus, in the absence of clear evidence, they are reduced to speculating, hypothesizing, and, at bottom, guessing about the sentiment of a majority of the employees. For my part, speculation and guesswork are no substitute for objective evidence of majority status and are simply not a proper basis for imposing on employees a bargaining agent not of their choosing.

Nor or am I persuaded by the contention that had this Employer refrained from some unlawful act or combination of acts these employees surely would have registered their majority support for the Union. Given such circumstances, the argument goes, we should not "reward" the wrongdoer, here the Employer who has engaged in serious misconduct, by merely applying our usual remedies. Instead we should "vindicate" employee rights by issuing a bargaining order in favor of the putative bargaining agent who has been frustrated in its effort to achieve clear majority status. Again, such an argument turns on pure speculation. Indeed, as most observers of organizational campaigns no doubt would agree, the outcome of such campaigns is unpredictable at best, and they are subject to ebb and flow in employee sentiment that as often as not has little to do with conduct, lawful

or otherwise, engaged in by one of the parties.[37] Accordingly, where there has been misconduct by an employer but there has never been a clear showing of majority support for the union, the majority grabs the wrong end of the stick by asserting that only by imposing a bargaining order in these cases can we punish the wrongdoer and "vindicate" employee rights. If anything, such a "remedy" merely exacerbates the damage done to employees' rights by assuming the critical fact of majority status and imposing the bargaining agent on employees who might well have rejected representation *even* in the absence of any employer misconduct.

All this brings me to a less obvious but equally important consideration: What objective or indeed subjective standard or standards will the Board majority now apply in determining whether the facts of any particular case warrant application of a nonmajority bargaining order remedy? And, regardless of the standard the majority settles upon today, what is to prevent the current majority or some like-minded majority of the Board in the future from diluting those standards in cases down the road, perhaps to the point where the exceptional remedy of today becomes the commonplace remedy of tomorrow?

As to the first question, I believe that the majority itself concedes that it can devise no "bright line" test for the application of a nonmajority bargaining order remedy. Of course, there are areas of the law where standards and tests are difficult, perhaps impossible, to formulate, and where, as a consequence, the Board has found it necessary to fall back on "all the surrounding facts and circumstances" or some similar approach. I submit, however, that generally the Board has fared better in administer-

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[37] Getman, Goldberg, Herman, "Union Representation Elections: Law and Reality" (1976). See also Getman and Goldberg, "The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation," 28 Stanford L. Rev. 263 (1976).

ing the Act and effectuating its purposes when it has been able to establish and explicate clear standards and guidelines. At least in these circumstances all parties understand that conduct which violates the standards will trigger a particular finding and relief. I further submit that the Board ought not to create new areas of uncertainty and confusion over the standard to be applied and the remedy that may be granted, particularly where the remedy may itself be potentially damaging to employee interests as a nonmajority bargaining order. Moreover, if recent experience with circuit court criticism of our issuance of the usual *Gissel* bargaining order is any guide,[38] one cannot be confident that, whatever the majority *says* about its standards today, in practice those standards will not be watered down with the passage of time.

Finally, my unwillingness to join in a nonmajority bargaining order *should not be understood as insensitivity to the serious misconduct which occurred here or as a lack of concern for providing a full and effective remedy.* Thus, with one exception,[39] I join the majority's substan-

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[38] *N.L.R.B.* v. *Arrow Molded Plastics, Inc.*, 653 F.2d 280 (6th Cir. 1981); *N.L.R.B.* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *Red Oaks Nursing Home, Inc.* v. *N.L.R.B.*, 633 F.2d 503 (7th Cir. 1980); *Grandee Beer Distributors, Inc.* v. *N.L.R.B.*, 630 F.2d 928 (2d Cir. 1980); *N.L.R.B.* v. *Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir. 1979); *N.L.R.B.* v. *Western Drug*, 600 F.2d 1324 (9th Cir. 1979); *N.L.R.B.* v. *Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *First Lakewood Associates, limited partnership, et al.* v. *N.L.R.B.*, 582 F.2d 416 (7th Cir. 1978); *Kenworth Trucks of Philadelphia, Inc.* v. *N.L.R.B.*, 580 F.2d 55 (3d Cir. 1978).

[39] I do not agree with the majority that the Board should find that respondent unlawfully discharged striking employees by its April 20 mailgram. The Charging Party filed charges with the General Counsel alleging that the April 20 mailgram violated Sec. 8(a)(1) of the Act by threatening to discharge employees because of their involvement in protected concerted activities and that the mailgram also violated Sec. 8(a)(3) of the Act by discharging the striking employees. However,

tive findings of violations. I also join my colleagues in granting extraordinary remedies other than a bargaining

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the General Counsel issued a complaint alleging *only* that the April 20 mailgram violated Sec. 8(a)(1) by threatening employees with discharge, and the complaint was not amended at the hearing to include the allegation of an actual discharge. Consistent with the complaint allegations and the record evidence the Administrative Law Judge found, and I agree, that the mailgram unlawfully threatened the striking employees with discharge in violation of Sec. 8(a)(1) of the Act.

In their exceptions to the Administrative Law Judge's Decision, the General Counsel and the Charging Party contend that the Administrative Law Judge erred by failing to find that, in addition to threatening the strikers with discharge, the mailgram further violated the Act by unlawfully discharging the striking employees. The majority finds merit to these exceptions, and in fn. 5, *supra*, the majority contends that the discharge issue was fully litigated and that, therefore, the Board is not precluded from finding that the mailgram had unlawfully discharged the strikers.

In the circumstances of this case, where the discharge issue was initially raised in the charge but was not alleged as an unfair labor practice in the complaint, I conclude that Respondent was led to believe that the discharge issue was not before the Board. Sec. 3(d) of the Act vests the authority to issue unfair labor practice complaints with the General Counsel, and in this case the General Counsel saw fit not to allege that the mailgram had violated the Act by unlawfully discharging Respondent's striking employees. Further, it is important to note that this is not the type of case where, during the hearing, the General Counsel discovers previously unavailable evidence indicating additional unfair labor practices. Clearly, the General Counsel had long been aware of the existence of the mailgram. In my view, it is patently unfair to permit the General Counsel to raise the discharge issue at such a late stage, and after the record has been closed. Thus, we can only speculate as to how Respondent might have changed its litigation strategy or presented its facts differently if the discharge issue, with its substantial backpay liability, had been timely raised. Once the record has been closed, and, if you will, all bets called, it is too late to raise the ante and attempt to collect additional chips. Accordingly, I find that the discharge issue was not timely raised and not before the Board.

order. Indeed, I believe in the salutary effect of extraordinary remedies in cases, such as the instant one, involving flagrant and repeated violations of the statute. However, unlike the majority, I am satisfied that the extraordinary remedies which I join in granting here are sufficient to provide an adequate remedy for the wrongdoing in issue, while ensuring that the right to choose guaranteed to employees under Section 7 of the Act is not trenched upon by either this Respondent or the Board.

Dated, Washington, D.C. May 28, 1982

ROBERT P. HUNTER, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights. More specifically,

WE WILL NOT discharge or in any other manner discriminate against employees because of their union activities.

WE WILL NOT threaten or warn employees with discharge, loss of benefits, or other reprisals because of their union activities, membership, or support.

WE WILL NOT threaten to close the plant in order to prevent union activities among our employees.

WE WILL NOT discharge or fail or refuse to either reinstate striking employees upon their unconditional application to return to work or fail to do so in a timely fashion.

WE WILL NOT discourage membership or activities on behalf of Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, by discharging employees or discriminating against them in their hire or tenure.

WE WILL NOT coercively interrogate employees concerning their union membership, activities, or support.

WE WILL NOT solicit employee grievances and promise that such grievances will be adjusted.

WE WILL NOT promise or grant improved or additional new economic benefits or other terms or conditions of employment if they abandon their support of a union.

WE WILL NOT create among our employees the impression that their union activities are under surveillance.

WE WILL NOT threaten to never negotiate with a union should it lawfully represent our employees in order to discourage union membership, activities, or support.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the unfair labor practice strikers listed in Appendix C immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions.

WE WILL pay Ruby Toomer, Carmen Sagardia, Jose Santiago, and all the employees and unfair labor practice strikers listed respectively in Appendixes B and C for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL send to all our employees copies of this notice; WE WILL read this notice to all our employees; and WE WILL publish copies of this notice in local newspapers.

WE WILL, upon request of the Union made within 1 year of issuance of the Board's Decision and Order, make available to the Union a list of names and addresses of all our employees currently employed.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our plant in nonwork areas during employees' nonworktime in order that the Union may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

WE WILL, if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, give the Union reasonable notice and give two union representatives a reasonable opportunity to be present at such speech and, on request, give one of them equal time and facilities also to speak to you on the question of union representation.

WE WILL bargain collectively, upon request with the above-named Union as the exclusive bargaining representative of all employees in the unit described

below, with respect to rates of pay, wages, hours of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including shipping and receiving employees, warehouse employees, truck drivers and janitorial maintenance employees employed by us at our Edison plant, but excluding all office clerical employees, plant clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Our employees have the right to join Local 222, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or to refrain from doing so.

CONAIR CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-3652.

APPENDIX B

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Lucille Allen	October 4, 1977
Mario Arocho	October 4, 1977
Rosita Cruz	October 4, 1977
Christina De Armas	October 4, 1977
Florence L. Heimbuch	October 4, 1977
Carmen Irizzarry	October 4, 1977
Florence F. Jacko	October 4, 1977
Beulah Jones	October 4, 1977
Flora F. Kurtanick	October 4, 1977
Dorothy Lodato	October 4, 1977
Victor Maisonet	October 4, 1977
Irene Martinez	October 4, 1977
Laura Martinez	October 4, 1977
Miliady Mendez	October 4, 1977
Milagros Muniz	October 4, 1977
Luis B. Ortiz	October 4, 1977
Yillian T. Perez	October 4, 1977
Olga Rios	October 4, 1977
Ana Santiago	October 4, 1977
Carmen M. Sagardia	October 4, 1977
Rosaura Soto	October 4, 1977
Ismael Torres	October 4, 1977
Verta May Allen	October 11, 1977
Hector Caraballo	October 11, 1977
Hilda Della Torre	October 11, 1977
Margarita Gautier	October 11, 1977
Carmen Lopez	October 11, 1977
Luz M. Melendez	October 11, 1977
Hilda Perez	October 11, 1977
Alicia Rivera	October 11, 1977
Jose R. Rivera	October 11, 1977
Genovena Arocho	October 12, 1977
Olga Chalfa	October 12, 1977
Patricia Eaford	October 12, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Rosaria Machin	October 12, 1977
Rosalia Mendez	October 12, 1977
Jose Negron	October 12, 1977
Antonio Neiro	October 12, 1977
Julia Pellallera	October 12, 1977
Lilia Quiles	October 12, 1977
Awilda Rodriguez	October 12, 1977
Jose Santiago	October 12, 1977
Aida Iris Torres	October 12, 1977
Alberto Vargas	October 12, 1977
Elsie Vega	October 12, 1977
Adamina Nieves	October 14, 1977
Virginia Rivera	October 14, 1977
Rufino Saez	October 14, 1977
Portinia Soto	October 14, 1977
Rafael Valdes	October 14, 1977
Mayes Garcia	October 18, 1977
Gloria Guzman	October 18, 1977
Juan Hernandez	October 18, 1977
Roberto Mercado	October 18, 1977
Elizabeth Muniz	October 18, 1977
Wildilia Santiago	October 18, 1977
Sonia Torres	October 18, 1977
Felix Vasquez	October 18, 1977
Miguel Aquino	October 19, 1977
Celia Cruz	October 19, 1977
Celia Febles	October 19, 1977
Wilfredo Guerrero	October 19, 1977
Alice Jones	October 19, 1977
Noraima Mendez	October 19, 1977
Martha Parada	October 19, 1977
Jose Vazquez	October 19, 1977
Wilfredo Vazquez	October 19, 1977
Etta Burns	October 24, 1977
Hiriam Guzman	October 24, 1977
Carmen Sanson	October 24, 1977

NAME OF EMPLOYEE	DATE OF REINSTATEMENT
Alida Pabon	October 25, 1977
Michael Billings	November 2, 1977
Dominga Cruz	November 2, 1977
Martha Davison	November 2, 1977
Evelyn Lee	November 2, 1977
Annette Palmer	November 2, 1977
Denise Perrotte	November 2, 1977
Raymond Crespo	November 7, 1977
David Letendre	November 7, 1977
Richard Letendre	November 7, 1977
Ana Rose Fernandez	November 7, 1977

APPENDIX C

UNFAIR LABOR PRACTICE STRIKERS NOT REINSTATED

Shirley Bagby
Yvette Casquette
Lydia Gonzales
Enrique Luciano
Jose R. Mendez
Adolfo Nunez
Jose Nunez
Stephen Olah
Adrian Pagan
Gertrudes U. Rodriguez
Jesus Santiago
Ernesto Soto
Luz C. Villanueva